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4 Cal.2d 367

PEOPLE v. WEST.

Cr. 3870.

Supreme Court of California.

Sept. 26, 1935.

Rehearing Denied Oct. 24, 1935.

1. **Homicide** ⚷253(1)

Evidence *held* to sustain conviction for first degree murder.

2. **Criminal law** ⚷511(7)

Accused's own statements and admissions in connection with other facts independently proved *held* to afford corroborative proof sufficient, without testimony of accomplice, to sustain conviction for murder in first degree.

3. **Criminal law** ⚷1038(3)

Where accused's own statements and admissions in connection with other facts independently proved afforded corroborative proof sufficient, without testimony of accomplice, to sustain conviction for first degree murder, failure of court on its own motion to instruct that testimony of accomplice was insufficient to connect accused with crime, unless it was corroborated by other evidence, *held* not prejudicial error requiring reversal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Arthur D. West was convicted of murder in the first degree without recommendation, and he appeals.

Affirmed.

Gerald Kenny, Public Defender, and J. A. Toner, Asst. Public Defender, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Matthew Brady, Dist. Atty., J. J. McMahon, Asst. Dist. Atty., and R. E. Burns, all of San Francisco, for the People.

SHENK, Justice.

Arthur D. West and Howard P. Smith were by the same information accused of the murder of Roy V. Lockwood on October 4, 1934. Each pleaded not guilty, and West in addition pleaded not guilty by reason of insanity. They were tried jointly on the issues raised by the pleas of not guilty. The jury found West guilty of murder in the first degree, without recommendation, and returned a verdict of second degree murder as to Smith. Subsequently West withdrew his plea of not guilty by reason of insanity, and has appealed from the judgment entered and sentence imposed pursuant to the verdict returned against him, and from an order denying his motion for a new trial.

The appellant, the deceased, Lockwood, and Smith were soldiers in the United States Army. All three were stationed at the Presidio in San Francisco and were assigned to detail at Letterman General Hospital. The three shared the same barracks.

[1] About 4:30 p. m. of October 4, 1934, they were off duty. West asked Lockwood at the barracks if he cared to drive down town for a bite of supper to which Lockwood assented. West asked Smith to join them. Smith had just eaten a meal, but said he would go along. West carried with him a package wrapped in brown paper, without a string on it, which he said contained clothing he promised to deliver to a destitute woman who lived in a house on Ortega street which he would identify. The three entered Lockwood's one-seat car, with Lockwood at the wheel, Smith next to him, and West on the right end of the seat. They drove from the Presidio through the Thirteenth avenue exit, across Golden Gate Park to the neighborhood of Ortega street and Thirty-Seventh avenue. West feigned to be looking for the house of the fictitious destitute woman. While they were driving along Santiago street approaching Forty-Third avenue, West drew a gun from the package on his lap and aimed it at Lockwood. Three shots were fired. The first entered Lockwood's chest. Another pierced his head, and one entered the car door. Smith took control of the car, turned it into Forty-Third avenue, and brought it to a stop. West threw away a blue shirt which he had in the package with the gun. They left Lockwood and the automobile and boarded a street car back to town. They stopped at a cleaning establishment where blood was removed from the sweater Smith was wearing. They separated after they had agreed to make the statement, if questioned, that they had started to town with Lockwood, but parted from him at Van Ness avenue and Geary street.

They gave some such account when apprehended at the barracks about midnight that same night, but, when they were confronted with evidence of the falsity of their statements—sand found in West's shoes, the gun in his locker, witnesses who saw them drive toward the Thirteenth avenue exit from the Presidio, and other evidence—West and Smith made oral and written signed statements of the undisputed facts hereinabove narrated. It is in evidence further that at that time West stated that he bore a grudge against Lockwood because about a year prior thereto, while Lockwood and he were driving down the Skyline boulevard, he stepped out of the car to buy a package of cigarettes and Lockwood drove away, leaving him to walk the major portion of the fifteen miles back to the city.

West took the stand in his own behalf. He testified that he was then thirty-three years of age; that he had attended school only as far as the third grade; that he enlisted at Atlanta, Ga., and had been in the Army since about June, 1929. He stated that some time in the month of July, 1934, he had asked Lockwood to pawn a watch and a ring for him; that Lockwood obtained $60 for the watch and ring and exhibited the receipt to him, but refused to turn over to him either the money or the receipt; that about a month prior to the shooting he purchased a gun, giving and signing a fictitious name, and about three weeks later he bought some cartridges. He stated further that he loaded five of the bullet chambers about noon of October 4th; that his intention was to use the gun to bluff Lockwood into delivering up the pawn receipt, and that, when he reached midway across Smith and aimed the gun at Lockwood's chest, the latter made a lunge at him across Smith and knocked West's arm and trigger finger back, causing one of the bullets to explode and strike Lockwood in the chest; that then everything went black; that they kept on arguing, Smith sitting with his arms folded, looking from one to the other, "so, then two more shots went off * * * to my unknowing." Smith, on the other hand, testified that after the first shot Lockwood made a feeble lunge at West and lay across Smith when the second and third shots were fired. Smith remained with folded arms until after the third shot, when he took the wheel and applied the brakes.

West admitted on the stand that, when he filled five chambers of the revolver, he was thinking of Lockwood and his desire to obtain the receipt from him, but that his intention was only to "bluff" Lockwood into giving up the receipt. From Smith's testimony we learn that about the time West purchased the gun, a .32-caliber Iver Johnson revolver, he exhibited it to Smith and, asking him if he could keep a secret, stated that he (West) was "going to get" Lockwood. Both men by their testimony indicated that the purpose of obtaining Smith's companionship on the drive was to give West the opportunity he sought, inasmuch as West felt he could not induce Lockwood to take him out unless some third person were along. West admitted on the stand that he put no string around the brown paper wrapped parcel and placed the gun merely on top of the shirt inside the package so as to be able more easily to take the gun from the package.

The main contention on the appeal is that there is lacking any evidence to establish the element of premeditation or preconceived design to kill essential to a verdict of first degree murder under the circumstances here disclosed. The foregoing brief outline of the salient facts and admissions of the appellant is sufficient refution of any merit in that contention. In this case the question of intent, premeditation, and malice were questions for the jury, and its finding thereon is well supported. Furthermore, a review of the record discloses that the appellant had a full and fair trial, without prejudice to any of his rights by reason of any ruling of the trial court, or in the giving of any instruction, or in the remarks of the deputy district attorney in his arguments to the jury. It also appears without question that the oral and written statements made by the defendants were made freely and voluntarily and without any pressure or promise of immunity.

[2, 3] The foregoing conclusions also answer the appellant's contention that the trial court should have given some instruction to the effect that the testimony of the accomplice Smith was insufficient to connect the appellant with the crime unless it was corroborated by such other evidence as would tend to connect the appellant with the commission of the crime charged. An instruction on the subject was not requested by the appellant. The appellant concedes the proper test to be that, if there be eliminated from the case the testimony of the accomplice, and an examination of the testimony of the other witnesses be had with a view to determine whether there

be inculpatory evidence, and if such evidence be found, then the accomplice is corroborated. Such an examination of the record obviously meets the test in this case. The appellant's own statements and admissions, in connection with the other facts independently proved, afford corroborative proof sufficient to sustain the verdict. People v. Negra, 208 Cal. 64, 69, 70, 280 P. 354, and cases cited. The state of the record compels the conclusion that the appellant was in no respect prejudiced by the failure of the court, on its own motion, to give the instruction.

The judgment and order are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.

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4 Cal.2d 354

LANTHIER v. WHARTON.

S. F. 15155.

Supreme Court of California.

Sept. 25, 1935.

Waters and water courses 🔑154(1)

Agreement entered into between vendor and purchaser contemporaneous with execution of deed, whereby vendor allowed purchaser to connect pipe line to well on vendor's land and use water for domestic purposes upon payment of share of expense of maintenance of well, *held* to create easement in favor of purchaser, though exact details as to how much water could be used, etc., were not set out.

In Bank.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Action by Charles Lanthier against Ivan Wharton, administrator of the estate of C. W. Wharton, deceased. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

James Snell and Chester E. Ross, both of Hollister, for appellant.

John T. Lewis, of Hollister, for respondent.

LANGDON, Justice.

This is an action to enforce an agreement involving a water right. In 1929, C. W. Wharton was the owner of a piece of land in San Benito county, on which he had partly constructed a dwelling house, and had installed a well, equipped with a pump and motor. Negotiations were commenced by plaintiff to purchase a portion of the land including the house, but not including the part on which the well was located. Plaintiff declared that he would not buy the property unless he could get water for domestic purposes, and the parties, thereupon, contemporaneously with the execution of the deed, entered into an agreement providing as follows:

"For and in consideration of the promises hereinafter contained and for other valuable consideration, party of the first part agrees to allow the party of the second part to connect on his pipe-line and to use water from his well for domestic purposes; and the party of the second part agrees to pay to the party of the first part his share of all electricity, also to pay one-third of the expense of the upkeep of the motor and pump. It being mutually agreed between both parties that this agreement covers only the present well upon the party of the first part's premises. It being mutually agreed and understood between both parties that at any time the party of the second part wishes to discontinue the using of the water from said well, he may do so by giving a release. * * *"

Plaintiff then proceeded to occupy the land, connected to the pipe line, and used the water regularly for domestic purposes. Wharton charged him 50 cents per month for the electricity, raising it subsequently to 75 cents per month. In 1931 Wharton died, and defendant, his administrator, raised the charge to $1.25 per month. In February, 1933, defendant disconnected the pipe line, and refused to permit the further taking of water. Plaintiff then brought this action. The lower court concluded that the agreement set forth above created an easement in favor of plaintiff's land to the use of the water, and permitted an amendment of the complaint to conform to proof, by description of the dominant and servient tenements. Judgment was entered for plaintiff in language which followed that of the agreement.

Defendant's chief contentions on appeal are that the agreement did not purport to create an easement, being intended merely as a personal obligation of Wharton; and that in any event the agreement was too uncertain as to the amount of water and the purposes of its use, to be enforced. The judgment is likewise attacked for uncertainty.

In our opinion the judgment of the lower court was correct. The intention of the parties to make the transfer of the property conditional upon the assurance of a water right is entirely clear. The land from which the water was to be taken and the land on which it was to be used are likewise clearly specified; and the particular well and pipe line were identified in the agreement. The use of the water is expressly limited to domestic purposes. To the objection of defendant that it does not specify the size of the lead pipe, the exact quantity of the water, the manner in which the electricity is to be furnished or paid for, etc., it may be observed that the parties were not required to set forth in meticulous detail provision for every question that might arise in the operation of the agreement. They were satisfied to measure the amount of water by the domestic requirements of the building conveyed, instead of by a fixed amount. Provisions similarly general have been held enforceable. See Clyne v. Benicia Water Co., 100 Cal. 310, 34 P. 714; Henrici v. South Feather L. & W. Co., 177 Cal. 442, 170 P. 1135; Newell v. Redondo Water Co., 55 Cal. App. 86, 202 P. 914.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

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4 Cal.2d 322

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. MANTZ.

S. F. 15151.

Supreme Court of California.

Sept. 19, 1935.

Rehearing Denied Oct. 19, 1935.

1. Divorce 🔑249(3)

Separate property cannot be awarded in divorce action (Civ. Code, § 157).

2. Husband and wife 🔑265½

Wife who procured judgment against former husband adjudicating certain property to be community property was estopped from denying in creditor's suit to subject such property, which had been awarded to wife, to payment of judgment on community debt that property was not community property (Code Civ. Proc. § 1962, subd. 3).

3. Husband and wife 🔑269

Failure of payee of obligation maturing October 7, 1928, which was guaranteed by husband and was community debt, to bring suit until May 8, 1931, *held* no defense in creditor's suit to subject property awarded to wife as community property to payment of judgment on debt (Civ. Code, § 2823).

4. Husband and wife 🔑269

Property awarded to divorced wife as community property *held* subject, in creditor's suit, to payment of final judgment on community debt after return of execution nulla bona in absence of effective legal remedy, notwithstanding that collateral for debt had not been exposed to sale, since wife could be subrogated to rights of judgment creditor in collateral after satisfying judgment (Code Civ. Proc. § 1908, subd. 2; Civ. Code, §§ 161a, 2845).

THOMPSON and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by the Bank of America National Trust & Savings Association, a national banking association, against Myrtle L. Mantz, formerly known as Myrtle L. Gorman. From the judgment, the plaintiff appeals.

Affirmed in part, and reversed in part, with directions.

Rehearing denied; SHENK, THOMPSON and CONREY, JJ., dissent.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

Rogers, Clark & O'Brien, of San Francisco, for respondent.

PRESTON, Justice.

This action is by plaintiff, a judgment creditor of A. W. Gorman, against defendant, who is the divorced wife of Gorman, to impress a lien upon certain valuable residence property in Atherton, San Mateo county, upon the contention that the judgment is a community debt and the property, prior to divorce, was the community property of the spouses, which as such may be subjected to payment of the judgment. While the prayer is that all of said property be declared community property, and subjected to the lien of said judgment, the briefs all proceed upon the assumption that only a one-half interest therein is involved, being the interest derived by the wife from the husband on January 3, 1931, prior to final decree of divorce. Defendant answered, denying the claim of plaintiff, and after pleading several special defenses, prayed that her title to the whole of said property be quieted as against the claims of plaintiff. The court granted her prayer in full. Plaintiff appealed from the judgment and also appealed from an order subsequently made denying its motion to vacate the judgment and enter a different judgment.

Our conclusion is that the judgment must be affirmed as to the one-half interest in said property and reversed as to the remainder. This conclusion automatically disposes of both appeals.

The underlying facts necessary to a consideration of the case are as follows: A. W. Gorman, after making a spectacular rise financially through certain stock speculations, married respondent on March 21, 1925. The property which is the subject of this action was purchased October 26, 1926, and title thereto taken in the name of the spouses as joint tenants. Gorman had, on October 1, 1926, organized the firm of Gorman, Kayser & Co., and through it re-entered the stock brokerage business. Between said date of purchase and the middle of the year 1928, he and his wife had caused a valuable residence to be erected and other improvements to be made on the said property at a cost of some $200,000. On October 6, 1926, Gorman, acting, it is claimed, for the above-named firm, consisting of twelve members, executed in writing a guaranty agreement in support of the written obligation of Charles L. Ebner, Jr., himself one of said partners, in the principal sum of $23,000, payable to the predecessor of plaintiff. Said guaranty read as follows: "For value received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof, and I hereby waive presentation, demand, protest, notice of protest and notice of non-payment. (signed) A. W. Gorman."

The court found, and respondent concedes, that this obligation became a so-called community debt of the Gormans. Thereafter, and on December 2, 1929, the Gormans, in contemplation of separation, made a property settlement agreement, which confirmed the said above-mentioned joint tenancy of said property and each spouse acknowledged ownership by the other of a one-half interest therein. On December 3, 1929, an interlocutory decree of divorce was granted the wife on grounds of cruelty and the said property settlement agreement was therein and thereby confirmed. Thereafter, and on August 12, 1930, said Gorman reported to appellant, in a financial statement, that he owned a half interest in said property and that his former wife owned the other half, each holding as a joint tenant. However, on December 2, 1930, respondent, the wife, filed a second and supplementary action against her former husband to impeach said above-mentioned property settlement and to have amended accordingly the interlocutory decree. Respecting the property in suit, she alleged in paragraph II of her complaint as follows: "That all of the property owned or possessed by either plaintiff or defendant during the continuance of their marriage was community property, the whole thereof having been acquired by them through their joint efforts after the marriage."

Upon the above allegation, the court made a finding of fact as follows: "The court finds that each and every allegation contained in Paragraphs I and II of the complaint on file herein are true, except that a one half undivided interest in the real property hereinafter described on page 3 hereof, to wit, the Atherton property was the sole and separate property of said plaintiff, free and clear of any lien or interest in said defendant."

On January 3, 1931, the court awarded the half interest in said property standing in the name of the husband to the wife as a part of her share of the community property, holding that the first property settlement "did not set forth an equal and just distribution of all community property." The interlocutory decree of divorce was modified accordingly. The husband made a deed to the wife on said day and thereafter, on January 7, 1931, the court entered a final decree of divorce.

Meanwhile financial difficulties had overtaken the firm of Gorman, Kayser & Co., and on December 16, 1930, a receiver was appointed to liquidate the company. On May 8, 1931, plaintiff began an action against Gorman and also against the individuals comprising said firm upon said above-mentioned obligation. Thereafter and on June 1, 1932, it secured judgment against Gorman, but the individual members of the firm, other than Gorman and Ebner, were exonerated by said judgment. The liability of the individual members of the firm has not yet been determined, but for the purposes of this case, by stipulation, the judgment in their favor is to be considered as final. On June 18, 1932, execution was issued on said judgment against Gorman and returned nulla bona.

Basing its claim upon this judgment and return of the execution thereon unsatisfied, plaintiff and appellant here beseeches a court of equity, praying that at least the half interest in said property awarded to the wife by the supplementary suit and final decree of divorce be declared available for payment of said judgment and that it be impressed with a lien and sold for that purpose.

The basis of this plea is that by the judgment and decree in said supplementary action and by the final decree of divorce, the half interest in the property became and is community property of the Gormans; that as against the debtor or his judgment creditor, she must take the property cum onere.

[1] We see no escape from the binding efficacy of this contention. Upon no other hypothesis could respondent wife have received it under said decree. Separate property cannot be awarded in a divorce action. Section 157, Civ. Code; Allen v. Allen, 159 Cal. 197, 113 P. 160. This is true in spite of the findings and judgment of the trial court that said property was separate property of Gorman and is now the separate property of respondent. In other words, it is quite true that but for said adjudication, invited by respondent, the evidence would amply support the conclusion of the trial court that originally it was the husband's separate property. But if it were his separate property, appellant would have the right to subject it to payment of its judgment unless the property, prior to lien of the judgment, had been conveyed to another, and even in that event, appellant could still follow it until it reached the hands of a bona fide purchaser or encumbrancer for value.

[2] Now when appellant was powerless to intervene, respondent procured a judgment against the debtor, her former husband, adjudicating the property to be their community property owned as husband and wife. Appellant, as a judgment creditor, is thus put at a distinct pecuniary disadvantage if it cannot rely upon this adjudication as a verity. Not only is there the privity between a judgment creditor and judgment debtor defined by subdivision 2 of section 1908 of the Code of Civil Procedure, but there seems to arise a clear case of equitable estoppel making directly applicable the provisions of section 1962, subd. 3, of said Code, as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." For a more extended discussion of the principle see Dool v. First Nat. Bank, 209 Cal. 717, 724, 290 P. 15; Burgess v. Cal. Mutual, etc., Ass'n, 210 Cal. 180, 188, 290 P. 1029; see, also, concurring opinion, Estate of Hill, 167 Cal. 59, 68, 138 P. 690. We regard this holding to be but a logical extension of the doctrine declared in Frankel v. Boyd, 106 Cal. 608, 39 P. 939; Mayberry v. Whittier, 144 Cal. 322, 325, 78 P. 16.

[3, 4] Respondent has declared this to be a creditor's suit, and, as such, certain prerequisites must appear. Accepting this statement as applicable to the case before us, we have a final judgment and a return of execution thereon nulla bona. This seems to satisfy all ordinary requirements for the bringing of this action. We are pointed to no remedy at law that would have been, at the time this action was begun, or will now be effective. Bond v. Bulgheroni, 215 Cal. 7, 10, 8 P.(2d) 130. We do not regard as applicable the contention that intentional delay has been indulged by appellant which precludes relief or that respondent is in any position to ask relief on account thereof, if it were true. The debt was one in which the respondent was as much interested as the husband. Neither of them took steps to compel action by appellant. Section 2845, Civ. Code. A wife, since 1927, at least, has had a "present, existing and equal" interest in the community property, although the management and control thereof is at all times in the husband. Section 161a, Civ. Code. The only limitation up-

on the wife is that she must act through her husband. If in point of fact there do exist assets available for the payment of this judgment, either out of the husband's separate property or out of the community property in his hands, it is the clear duty of respondent to discover them and bring them to the court's attention by proper pleading to marshal assets. Mayberry v. Whittier, supra. Forbearance to sue is no defense either for the husband or for respondent. Section 2823, Civ. Code.

Secondly, whether appellant ever succeeds in securing relief from the other individuals comprising the above-mentioned firm is not material to the maintenance of this suit. Neither is there merit in the fact that collateral to the extent of some $2,000 has not as yet been exposed to sale. When the judgment is satisfied by respondent, she may be subrogated to the rights of appellant therein.

In so far as the judgment confirms in respondent a half interest in said property received by her as joint tenant in 1926, it is affirmed, but in so far as it purports to quiet her title to the remaining one-half interest in said property, to wit, the interest received by her from her husband on January 3, 1931, it is reversed, with directions to the court below to enter a judgment in favor of appellant as to this interest and to give it such further relief as may be found consistent with this holding.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.

THOMPSON, Justice (dissenting).

I dissent. I cannot agree with the conclusion reached in this case for two reasons:

First. The action being in the nature of a creditor's bill to subject property awarded to the wife as community property prior to the time when the judgment which is the basis of the action was rendered, it was incumbent upon the plaintiff to allege and prove that the obligation was incurred by the husband for the benefit of the community. Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939; McKannay v. McKannay, 68 Cal. App. 701, 230 P. 214, and Deacon v. Deacon, 101 Cal. App. 195, 281 P. 533. In other words, the former wife should not be compelled, as a matter of equity, to pay an indebtedness incurred by her former husband, if the indebtedness was not incurred for the benefit of the community. Unless this be recognized as the true rule, a wife with a righteous complaint for divorce pending will be liable for the debts created by the husband prior to the decree, regardless of whether the effect will be to deprive her of her entire share of the community. The record in this case fails to establish that the obligation was incurred for the benefit of the community.

Second. The trial court found upon substantial evidence that the plaintiff was guilty of laches. For the sake of its own business, according to the finding, it neglected without any justification or excuse to enforce payment by Ebner or by Gorman and allowed collateral security worth $30,000 to depreciate until it had a value of only $2,000; that although it had opportunity to realize on the collateral, it willfully failed to liquidate or to cause the loan to be paid. The finding specifically says: "* * * that the aforesaid conduct and delay on the part of said plaintiff bank and its said predecessors in interest, and each of them, in failing to liquidate or realize the value of said collateral security within a reasonable time after the due date of said promissory note, to-wit, October 7, 1928, or to supervise said loan in any diligent or business-like manner, has irreparably prejudiced this defendant and her above-described real property in that said conduct on the part of said plaintiff bank, and its said predecessors in interest, and each of them, has resulted in the claim made by said plaintiff against defendant * * *" and that she "had no knowledge whatsoever at any time prior to the spring of the year 1932" that Gorman had executed the guaranty. The trial court was fully justified in considering all of the equities of the situation, and it having concluded the facts by its findings, the judgment should be affirmed.

I concur: SHENK, J.

4 Cal.2d 334

JENSEN et al. v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15277.

Supreme Court of California.
Sept. 20, 1935.

1. Judgment ⚷707

Judgment, appeal of which was dismissed by stipulation, in favor of party who sued to enjoin action of removing his name from civil service register of persons eligible for positions as policemen *held*, even if final, not res judicata as to later action brought by others on register to restrain removal of their names where there was no allegation in former action to indicate it was a representative suit.

2. Municipal corporations ⚷184(2)

Power granted by new city charter to Civil Service Commission to strike from civil service register, after two years, names of those eligible for positions as policemen could not be complained of as retroactive where former charter provided for same power, and where names of complaining parties were on list for more than two years after effective date of new charter.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Suit by Charles E. Jensen and others against the Civil Service Commission of the City and County of San Francisco and others. From a judgment for the defendants, the plaintiffs appeal.

Judgment affirmed.

Vincent W. Hallinan and William F. Herron, both of San Francisco, for appellants.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

Raymond D. Williamson, William E. Barden, and Arthur J. Healy, all of San Francisco, amici curiæ.

LANGDON, Justice.

This is an action to enjoin respondents from canceling a register of names of persons eligible for civil service positions as policemen in the city and county of San Francisco.

In 1928, the Civil Service Commission conducted examinations, and a number of successful persons, including plaintiffs, were on September 25, 1928, placed in a list of eligibles. On January 8, 1932, a new charter went into effect in San Francisco. Under both the old and new charters, the commissioners were given power to strike the names of candidates from the register after they had remained thereon more than two years; and the new charter further provided that all names "shall be removed at the expiration of four years." After the adoption of the new charter the commissioners indicated an intention to remove names from the list, and one Veston D. Williamson sued to enjoin this action. From a judgment in his favor, rendered on March 7, 1933, the commission appealed, but while the same was pending Williamson was appointed to the position he sought, and the appeal was, pursuant to stipulation, dismissed. By virtue of a further stipulation, the trial court set aside its judgment granting an injunction, and the action was dismissed with prejudice.

On May 2, 1934, the commission struck off the names of persons on the 1928 list, and prepared a new list of eligibles based upon a subsequent examination, from which various appointments were made. Thereupon plaintiffs brought this action. The trial court denied relief, and plaintiffs appealed.

[1] The chief point urged by plaintiffs is that the judgment granting an injunction in the Williamson case was final, and could not be set aside by the lower court, its order to that effect being void; and that this judgment is res judicata and determinative of the instant case because Williamson brought his action in a representative capacity, on behalf of all of the plaintiffs herein. The only showing made is an offer of proof that some of plaintiffs contributed money for Williamson's suit. There was no allegation in his action which in any way indicated that it was, or could have been brought as a representative or class suit. Hence the judgment in that action, even if it were final (which, in view of the stipulation on which the dismissal was entered, it clearly was not), could only affect the parties to it. See 21 C. J. 287, § 287.

[2] On the merits plaintiffs contend that to strike off their names will give the new charter a retroactive interpretation. We

are unable to follow the argument. The power of the commission to strike off names after two years was identical under both charters; and, moreover, the names of plaintiffs were on the list for more than two years after the effective date of the new charter before being removed.

There is, of course, nothing objectionable in such a power of removal vested in the commission. See Mann v. Tracy, 185 Cal. 272, 196 P. 484.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

4 Cal.2d 329

QUINN v. MATHIASSEN (JOHNSON, Intervener).

S. F. 15305.

Supreme Court of California.

Sept. 20, 1935.

1. Pleading 🔑63

Ordinarily, pleading which is framed in language of statute germane to action is sufficient.

2. Pleading 🔑63

In action to recover possession of real property which had been purchased by plaintiff at sale under trust deed, complaint which followed language of statute under which action was brought *held* sufficient to state cause of action (Code Civ. Proc. §§ 1161a, 1162).

3. Mortgages 🔑372(4)

In action to recover possession of real property which had been purchased by plaintiff at sale under trust deed, evidence *held* sufficient to support judgment for plaintiff (Code Civ. Proc. §§ 1161a, 1162).

4. Pleading 🔑34(1)

In action to recover possession of real property which had been purchased by plaintiff at sale under trust deed, word "note" in allegation of complaint that defendant had executed and delivered to plaintiff certain note and trust deed *held* equivalent of "promissory note" as regards sufficiency of complaint (Code Civ. Proc. §§ 16, 1161a, 1162; Civ. Code, § 3266).

[Ed. Note.—For other definitions of "Note" and "Promissory Note," see Words & Phrases.]

5. Mortgages 🔑372(4)

In action to recover possession of realty which had been purchased by plaintiff at sale under trust deed, contention that property had not been sold to highest bidder *held* unavailable, in absence of showing of financial responsibility of person who made higher bid at sale but whose bid was ignored after he had refused to inform auctioneer as to his ability to pay in cash (Code Civ. Proc. §§ 1161a, 1162).

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Robert Quinn against Selma J. Mathiassen, in which J. Johnson intervened. Judgment for plaintiff, and defendant and intervener appeal.

Affirmed.

J. J. Rose, Jr., of Oakland, for appellant Mathiassen.

H. F. Edson, of Oakland, for appellant J. Johnson.

J. A. Kennedy and Raymond Salisbury, both of Oakland, for respondent.

SEAWELL, Justice.

This action was commenced by plaintiff in the superior court of the county of Alameda, to recover from defendant Selma J. Mathiassen, trust creator, possession of the real property herein described, which was bid in by plaintiff at a sale had under a trust deed, the title to which was perfected in his name. J. Johnson intervened, claiming ownership and the right of possession, as the grantee of trust creator Mathiassen.

Section 1161a, Code of Civil Procedure, provides that, where "property has been duly sold in accordance with section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him [creator of trust holding over], or a person under whom he claims, and the title under the sale has been duly perfected," the purchaser thereof may remove such person who holds over and continues in possession after a three-day written notice to quit the same shall have been served upon him, and after like service upon a subtenant if there be one, as prescribed in section 1162, Code of Civil Procedure.

The pertinent portions of the above-cited Code section constitute the basis of the judgment from which the appeal herein is taken by defendant Selma J. Mathiassen and intervener J. Johnson. Selma J.

Mathiassen executed her promissory note in the sum of $7,500 to Margaret Carr Quinn, plaintiff's assignor, secured by a deed of trust of the real property described in the complaint herein as security for the performance of her obligations, as in said trust deed contained. Admitted breaches of said obligations placed her in default and said real property was sold under the power of sale contained in said trust deed, and the title thereto passed to plaintiff by virtue of said sale. After notice of intention to sell said real estate had been regularly given by plaintiff, assignee of said promissory note and deed of trust, and six days prior to the sale date, defendant Mathiassen executed a purported grant, bargain, and sale deed to intervener, Johnson. This deed was recorded at the request of Johnson on the very day the sale took place, at the hour of 9:44 o'clock a. m. The claim of intervener Johnson was effectively disposed of by the trial court, which found that the Johnson deed was recorded sixteen minutes prior to said sale, and that Johnson was not the owner of said real property at the time of said sale, and that he was not entitled to, nor had he ever been in, the lawful or peaceful possession of the same. That the execution of the Johnson deed was but a mere pretense at a transfer is amply sustained by the facts and circumstances of the transaction itself. Johnson did not appear at the trial, and no attempt was made to account for his absence. The trial court very properly mistrusted the bona fides of the alleged transfer.

[1-3] Defendant and intervener seem to rest their appeal almost entirely upon the alleged insufficiency of the complaint to state a cause of action, and their attack is both by general and special demurrer. Appellants' joint opening brief consists of less than five printed pages, and the closing brief less than seven pages. The statement of questions involved is set forth as follows:

"First: A complaint which does not state facts to constitute a cause of action raises no issues, and a judgment for plaintiff must be set aside.

"Second: A judgment based upon evidence of matters not within the issues raised by the complaint should be reversed."

The above statement amounts to nothing more than a statement of legal maxims. Appellants seem to take the position that each successive step taken in the sale proceedings should have been pleaded in full. The complaint is phrased largely in the language of the sections of the Code under which the action is brought. Ordinarily, it is sufficient to frame a pleading in the language of the statute germane to the action. It is true that the complaint is not as full or specific or as descriptive in its references as it may well have been. Nevertheless, neither the defendant nor the intervener seems to have had the slightest doubt as to the nature of the action or the kind of relief sought by it. The promissory note, deed of trust, and assignment thereof, notice of intention to sell, and every proceeding necessary to perfect title appear as exhibits in the case. The evidence further amplifies the transaction, and fully supports the findings and judgment. It was not necessary to set forth the note or trust deed in hæc verba.

[4] The fact is that both defendant and intervener admit the execution of said deed of trust and set up a defense thereto by way of avoidance. They were not, therefore, misled in any respect. Appellants specifically urge as an objection to the complaint that it contains the allegation that defendant Selma J. Mathiassen "did make, execute and deliver to the plaintiff a certain note and trust deed conveying the real property therein described", and contend that the word "note" is not the equivalent of "promissory note." They cite Webster as giving fifteen different definitions of the word "note." "Words and phrases are construed according to the context and the approved usage of the language." Section 16, Code Civ. Proc. The application of this section alone to the context in which the word is a part completely destroys appellants' contention. But, if this is not sufficient, section 3266, Civil Code, under the title of negotiable instruments sets the matter at rest. It reads: "In this title, unless the context otherwise requires— * * * 'Bill' means bill of exchange, and 'note' means negotiable promissory note."

[5] Appellants make the further objection that the real property was not sold to the highest bidder. It seems that during the bidding there appeared a man giving the name of Street whom no one knew, and who did not give any information concerning his financial rating, or exhibit any evidence of his solvency. A bid of $5,000 had been made by Mr. Quinn, and the stranger,

without any higher bid being made, raised the bid to $6,000. Upon hurried information being sought as to who Mr. Street was, and with no inclination on his part to inform the auctioneer as to his ability to pay in cash, he was passed by as an irresponsible person, and not a bona fide bidder. No attempt was made at the trial to establish his financial responsibility. His bid was ignored.

We have read the transcript in the case and find no merit in this appeal. There may be grounds for some of the technical objections made to the complaint, but, as to the cause upon its merits, neither the defendant nor the intervener has shown color or right of possession.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; LANGDON, J.

GOETTEN et al. v. OWL DRUG CO. et al.*

Civ. 10370.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1935.

Hearing Denied by Supreme Court Nov. 22, 1935.

1. Sales 🔑1(1), 274

Furnishing by restaurateur of food to patron is "sale," and implied warranty exists that food is wholesome and fit to eat, since patron makes known by implication that he desires wholesome food and he relies upon restaurateur's skill and judgment to procure food which can be eaten without deleterious effect (Civ. Code, § 1735).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

2. New trial 🔑35

In patron's action against drug store for damages suffered as alleged result of eating chow mein which contained glass and which had been delivered to drug store by outside manufacturer, exclusion from jury's consideration that drug store impliedly warranted that food was wholesome and fit to eat justified new trial, since warranty existed whether or not glass entered chow mein before or after it came into drug store's possession (Civ. Code, § 1735).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Hattie G. Goetten and John P. Goetten, husband and wife, against the Owl Drug Company, R. Thomasen, and others. From an order granting a new trial, the named defendants appeal.

Order affirmed.

George L. Greer, of Los Angeles, for appellants.

Mills, Hunter & Dunn, Paul J. Quigley, and C. R. Liljestrom, all of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Appeal by defendants Owl Drug Company and its manager, R. Thomasen, from an order granting a motion for new trial.

On November 18, 1933, respondent Hattie G. Goetten and her husband, John P. Goetten, went into appellants' place of business and ordered some chow mein at the lunch counter. In eating the same she noticed what seemed to be sand, and near the conclusion of the meal she choked and discovered and removed from her mouth a piece of broken glass about a quarter of an inch wide and somewhat longer. She at the same time swallowed a similar piece of glass and her mouth and throat were cut by the broken glass. There was evidence that the glass splinter removed from her mouth was green in color and appeared to be the same kind of glass as that of which the water glasses and other glassware used by appellants was made. The incident was immediately reported to the manager of the store and he in turn questioned the waiter, who informed him that there was glass in the food. In addition to the cuts in her throat and mouth, Mrs. Goetten suffered pains in her abdomen and nausea, was under medical care for a number of months, lost weight, and otherwise suffered ill health, while prior to the incident she had enjoyed good health. The foregoing facts do not appear to be controverted, with the exception that appellants in their brief assert that "Hattie Goetten never suffered any ill effects due to glass being swallowed." The latter statement is made in connection with a statement that her condition, other than the cuts in her mouth and throat, was produced, not as a proximate result of swallowing any broken glass, but was the result of a mental obsession, not

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*For subsequent opinion see 59 P.2d 142.

supported by the facts, that she had swallowed and retained in her system a quantity of broken glass. It was stipulated, however, that she was not malingering. The medical bills and expenses were stipulated to be in the amount of $1,160.

It appears from the uncontradicted evidence that the chow mein served by appellants was purchased from an outside manufacturer, was delivered in cans, and emptied into a container in the rear of the lunch counter of appellants at which all meals were served. Appellants did not include in the record a copy of the diagram of the lunch counter, but from the testimony of appellant Thomasen it appears that in addition to the steam table there were, back of and on each side of the counter, racks to hold glasses; that, when dishes were washed, they were taken to these racks, and that two out of the eight men employed back of the counter were engaged in washing dishes. The witness also testified that about twenty-five glasses were broken at the fountain during November, 1933, and that a piece of broken glass shown him resembled the glass used at the counter. There was a lid provided for the steam table which was supposed to be kept in place except when food was being served, and, if this lid was left off, there was danger of broken glass or other foreign substance getting into the food.

[1] Appellants' basic contention is that no recovery can be had by respondents except upon proof of negligence on their part; that the facts did not warrant the conclusion that there was any negligence; that the furnishing of the food to respondents did not constitute a sale; and that there was no implied warranty of the quality of the foods served.

The case of Loucks v. Morley, 39 Cal. App. 570, 179 P. 529, relied upon by appellants, is not applicable here. The real question there was whether under section 1775 of the Civil Code (repealed in 1931 [St. 1931, p. 2234]) the serving of food by a restaurant keeper was a sale "for domestic use," such sales carrying with them, under the section as it then read, a warranty of soundness and wholesomeness, and the decision is to the effect that such a transaction is not a sale for domestic use. It is worthy of note, however, that the two concurring justices refer to the furnishing by a restaurant keeper of food to a patron as a sale, and in the main opinion is cited the case of City & County of San Francisco v. Larsen, 165 Cal. 179, 131 P. 366, 367, in which the court, while holding that a restaurant keeper was not, within the terms of a license tax ordinance, a person who "sells or manufactures goods, wares or merchandise," also declared: "It cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum, with the charge for service and use of dishes, chair, and table. It is nevertheless a sale of the food consumed, within the technical definition of that term." This conclusion is well supported by Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100, and the cases therein cited and in the note thereto, as is also the conclusion that in such a sale there is an implied warranty that the food is wholesome and fit to eat. In its effort to prove that no glass remained in Mrs. Goetten's system, X-ray examinations being negative, appellants offered in evidence tests made with glass particles from their glassware which showed a lead content sufficiently high to show up under the X-ray, evidence which could only be admissible under the theory that the glass in the food eaten by Mrs. Goetten was of the same kind.

Section 1735 of the Civil Code provides that there is no implied warranty as to quality or fitness of purpose of goods under a sale except "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." Ordinarily, a patron at a lunch counter makes known, at least by implication, that he desires wholesome food; he relies upon the proprietor's skill and judgment to produce food which can be eaten without deleterious effect, and there is an implied warranty under the provisions of section 1735 that the food delivered is wholesome. A person who maintains a restaurant or lunch counter holds himself out as one who has for sale food which, so far as it is under his control, is wholesome and free from foreign substances dangerous to the human system. Patrons of such food dispensers rely upon this implied representation, for without it they would not be patrons. While there exists the action for damages where negligence of the purveyors of food can be proven, this is not the only protection afforded to their customers.

The application of the rule of implied warranty to cases such as that before us may impose a heavy burden upon the keepers of restaurants and lunch counters, but considerations of public policy and public health and safety are of such importance as to demand that such an obligation be imposed. As between the patron, who has no means of determining whether the food served is safe for human consumption, and the seller, who has the opportunity of determining its fitness, the burden properly rests with the seller, who could have so cared for the food as to have made the injury to the customer impossible. The most recent decision in this state applicable to the question is Gindraux v. Maurice Mercantile Co. (Cal. Sup.) 47 P.(2d) 708, in which it appeared that defendant had purchased some salami in a sealed package from the producer, a large packing company, and in the ordinary course of trade sliced the end off of the whole on an original package of salami and sold it to the plaintiffs for human consumption. Plaintiffs brought the action for damages suffered as the result of eating the salami, which the proof showed was infected with trichinæ. The court there says: "The defendant therefore knew by implication the particular purpose for which the salami was required. From that fact there arose an implied warranty that the commodity was reasonably fit for such purpose."

[2] The case at bar was submitted to the jury under the legal theory, declared in the instructions, that, unless it appeared from a preponderance of the evidence that the glass was allowed or permitted to get into the food through the negligence of the defendants, appellants here, the jury should return a verdict for the defendants. This error in excluding from the consideration of the jury the question of implied warranty—a warranty which existed regardless of whether the glass entered the food before or after it came into appellants' possession—amply justified the trial court in granting a new trial. As said in Gindraux v. Maurice Mercantile Co., supra: "If it were a 'sealed package' case, it would still be within the rule of warranty of fitness and merchantability."

Appellants suggest that the order granting a new trial be reversed because respondent Mrs. Goetten suffered no damage. The point is obviously without merit.

The order of the trial court granting a new trial is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 157

PEOPLE v. HAYES.

Cr. 2746.

District Court of Appeal, Second District, Division 2, California.

Sept. 13, 1935.

Hearing Denied by Supreme Court Oct. 10, 1935.

1. Criminal law 🔑1208(9)

Sentence under Indeterminate Sentence Law is for maximum term until action is taken by board of prison terms and paroles fixing term at period between maximum and minimum penalties (Pen. Code, § 1168).

2. Criminal law 🔑1144(17)

Court of Appeal is justified in assuming that board of prison terms and paroles has acted in accordance with Indeterminate Sentence Law and fixed definite term of imprisonment for prisoner sentenced under Indeterminate Sentence Law seven years previously, in absence of showing that board has failed to act (Pen. Code, § 1168).

3. Convicts 🔑5

That defendant is under life sentence or sentence of death does not afford him immunity from prosecution and conviction of other offenses, or from judgment and sentence upon such subsequent conviction.

4. Criminal law 🔑1216(2)

Where convict had been sentenced under Indeterminate Sentence Law, imprisonment under subsequent sentence after conviction of second crime would commence at termination of first term of imprisonment (Pen. Code, § 669, as amended by St. 1927, p. 1056, and § 1168).

5. Criminal law 🔑1216(2)

Consecutive sentences may be imposed upon person who has been convicted of two or more crimes.

6. Criminal law 🔑1216(2)

Whether sentences imposed on person after conviction of two or more crimes shall run concurrently is within discretion of trial court (Pen. Code, § 669, as amended by St. 1927, p. 1056).

7. Criminal law 🔑995(6)

Where defendant was serving prison term under Indeterminate Sentence Law at time of sentence for second crime, order of court as to when subsequent sentences should commence was unnecessary (Pen. Code, § 669, as amended by St. 1927, p. 1056, and § 1168).

8. Criminal law 🔑1216(2)

Statute providing that term of imprisonment should commence with delivery of defendant at place of confinement fixes time when defendant begins to serve sentence or series of sentences, and hence is not controlling upon question of duration of period of incarceration of person who has been sentenced to serve two or more terms (Pen. Code, § 670).

9. Criminal law 🔑1216(2)

Statute providing for manner, concurrent or consecutive, in which two or more sentences should be served, affects, not beginning, but duration of period of incarceration (Pen. Code, § 669, as amended by St. 1927, p. 1056).

10. Pardon 🔑4

Provisions of statute providing for duration of period of incarceration where two or more sentences have been imposed were self-executing as they existed in 1928, and conferred no powers upon board of prison terms and paroles to control serving of sentences consecutively or concurrently (Pen. Code, § 669, as amended by St. 1927, p. 1056).

11. Criminal law 🔑1216(2)

Sentence for robbery under Indeterminate Sentence Law and subsequent sentence for second crime ran consecutively by operation of law (Pen. Code, § 669, as amended by St. 1927, p. 1056, and § 1168).

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Robert E. Hayes pleaded guilty to robbery in the first degree, and from a judgment entered on his plea of guilty, he appeals.

Affirmed.

R. E. Parsons and A. Benjamin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appeal from order denying a motion to set aside two judgments.

Appellant was on May 25, 1928, convicted in the superior court in and for the county of San Francisco of the crime of first degree robbery and sentenced to imprisonment in the state prison at Folsom. After having begun service of his term under said sentence, and having on March 22, 1929, been indicted in Los Angeles county upon robbery charges, appellant was brought before the superior court at Los Angeles and there entered pleas of guilty to two counts of robbery, each of which the court found to be a robbery of the first degree, and thereupon on April 26, 1929, the court pronounced judgment sentencing appellant on each conviction to the state prison at Folsom. No appeal was taken from either of these judgments. In April, 1935, appellant filed a notice of motion in the superior court in and for Los Angeles county to vacate and set aside the judgments of that court. This motion was denied.

Appellant contends that the sentences imposed by the superior court at Los Angeles are ambiguous and uncertain in that they fail to state when they shall commence, and that if they commence upon the termination of the sentence under the prior conviction then the two later judgments and sentences would be unenforceable, since the first sentence was a sentence for life to which no further period of imprisonment could possibly be added.

[1-3] While it is true, as said in the case of In re Lee, 177 Cal. 690, 171 P. 958, In re Wignall, 193 Cal. 387, 224 P. 452, and In re Daniels, 106 Cal. App. 43, 288 P. 1109, that when a sentence is imposed under the Indeterminate Sentence Law (section 1168, Pen. Code), the term of imprisonment is for the maximum period provided by law as the penalty for the offense in question, this is true only to the extent that the term of imprisonment is the maximum provided by law until action is taken by the board of prison terms and paroles, which may and is required to fix the period of imprisonment at a period between the maximum and minimum penalties, and when so fixed the term of imprisonment is the period fixed by order of that board. People v. McNabb (Cal. Sup.) 45 P.(2d) 334; In re Daniels, supra. Since the San Francisco sentence was imposed in 1928, and assuming that the board has acted in accordance with the provisions of the so-called Indeterminate Sentence Law, a definite term of imprisonment has been fixed, and this court is justified in so assuming, since appellant has failed to make a showing to the con-

trary. But even where a defendant is already under a life sentence or even a sentence of death, this does not afford him immunity from prosecution and conviction of other offenses; nor does it preclude the court from passing judgment and sentence upon a subsequent conviction. The fact that a prisoner who serves a life term, and, while serving such, dies in prison cannot serve other sentences imposed for other offenses and running consecutively does not prevent, as a matter of law, the imposing of such consecutive sentences even though, as stated in Re Woofter, 134 Cal. App. 580, 583, 25 P.(2d) 859, the additional penalty cannot be imposed, i. e., actually inflicted, upon such life termer. It might also be mentioned that even where a prisoner is serving a life sentence this does not of necessity mean that he will remain in prison until he dies. Parole, commutation, or pardon may release him from prison long before his term of life ends.

[4] At the time of the imposition of the Los Angeles sentences section 669 of the Penal Code (as amended by St. 1927, p. 1056), so far as applicable here, provided that "when any person is convicted of two or more crimes the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment." This is sufficient answer to the contention that it cannot be determined when the Los Angeles sentences will commence. The legality of the indeterminate feature of our laws governing sentences is too well settled to require citation of authority.

[5] Appellant argues that the imposition of the Los Angeles sentences constituted excessive, cruel, and unusual punishment in violation of the State and United States Constitutions. No authorities are cited to sustain this contention, nor are we aware of any. On the contrary, it is well settled that consecutive sentences may be imposed. Appellant's argument is inconsistent with his other contention that under the San Francisco sentence he will remain in prison until he dies. If so, he will suffer no penalty under the Los Angeles judgments.

[6] Attention is called to the further provision of section 669 (as amended by St. 1927, p. 1056) as it existed in 1928, that "in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently," and appellant contends that his case is exceptional, and hence the sentences should have been ordered to run concurrently. The section leaves the matter entirely within the discretion of the trial court and there is nothing here to indicate an abuse of discretion. Criminals who roam from town to town committing robberies cannot expect that a series of depredations can be expiated by a conviction and sentence for one of the series of crimes, and may well anticipate that the usual and not the exceptional result of such activities will be consecutive and not concurrent sentences.

[7-9] There was no occasion, as that for which appellant contends, that the subsequent judgments should have specified when they should commence. That question is taken care of by the provisions of sections 669 and 1168 of the Penal Code and allied sections, and hence no order of court thereon was necessary. Section 670 of the Penal Code has no application to the question before us, as it only provides that "the term of imprisonment" of a defendant shall commence with the delivery of the defendant at the place of confinement. It merely fixes the time when a defendant begins to serve a sentence or series of sentences imposed, while section 669 provides for the manner, concurrent or consecutive, in which two or more sentences should be served, and hence affects, not the beginning, but the duration of the period of incarceration.

[10, 11] In arguing that section 669 of the Penal Code vests in the board of prison terms and paroles any power to control the serving of sentences consecutively or concurrently counsel has failed to consider that the provisions of the section, which, as they existed in 1928, were self-executing except when otherwise ordered by the trial court, and conferred no powers, discretionary or otherwise, upon said board. In the case at bar the sentences by operation of law run consecutively.

The judgments imposed were wholly in compliance with the law and valid, and appellant has not only failed to show any legal reason why they should be vacated or set aside, but has failed to show any legal defect or irregularity therein.

The order denying the motion to set aside the judgments is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 210

FARMER v. ENVOY PETROLEUM CO.

Civ. 10422.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1935.

1. Negligence 🔑117

In action based on defendant's negligence in conducting oil refinery, affirmative "further separate and second defense" which was set out in defendant's answer alleging facts which constituted negligence of plaintiff and that damage was directly caused and contributed to by negligence of plaintiff *held* sufficient to set up affirmative defense of contributory negligence.

2. Appeal and error 🔑533(1)

Opinion of trial court, though printed in transcript, is not part of record and cannot be considered on appeal.

3. Appeal and error 🔑907(3)

Where record on appeal consists only of judgment roll, appellate court must take statement of facts which appears in findings of trial court and must assume that evidence sustains such findings.

4. Negligence 🔑80

In action based on defendant's negligence in conducting oil refinery, defendant would not be liable where plaintiff was guilty of negligence which contributed to his own injuries.

◆

Appeal from Superior Court, Los Angeles County; C. A. Paulsen, Judge.

Action by A. L. Farmer, doing business as the California Tank Line, against the Envoy Petroleum Company, sued as the D. R. Wilson Refining Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

William J. Claassen, of Los Angeles, for appellant.

A. L. Abrahams, and Frank H. Love, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The plaintiff and cross-defendant appeals from a judgment in favor of the defendant in an action for damages based upon the negligence of the defendant in conducting an oil refinery and in the delivery of gasoline to the plaintiff's truck from the loading rack upon the premises of the defendant's refinery. The appeal is upon the judgment roll alone.

[1] It is the plaintiff's first contention that the pleadings do not set up an affirmative defense of contributory negligence. An examination of the record discloses that the defendant in its answer set up "a further separate and second defense" which was affirmative in character, alleging the facts which constituted the negligence of the plaintiff, and "that the said fire and the said damage was proximately and directly caused and contributed to by the said wrongful conduct, carelessness and negligence of plaintiff." We find no merit in this contention.

[2, 3] The plaintiff sets out in his brief at great length the written opinion of the trial court, and largely depends upon this written opinion for his recitation of facts. It has been held that such an opinion, though printed in the transcript, is not a part of the record on appeal and cannot be considered by the court for such purpose. DeCou v. Howell, 190 Cal. 741, 214 P. 444; Northern Assurance Co. v. Stout, 16 Cal. App. 548, 117 P. 617. Where the record on appeal consists only of the judgment roll, the appellate court must take the statement of facts which appears in the findings of the trial court and must assume that the evidence sustains such findings. Porter v. Hilton, 214 Cal. 705, 298 P. 501, 7 P.(2d) 301; Northern Assurance Co. v. Stout, supra.

The plaintiff's two remaining contentions are inextricably founded upon the facts so set forth in the opinion of the trial court.

[4] It is the plaintiff's second contention that "that person is liable who negligently institutes the cause which, in continuous sequence, results in the ultimate injury." It is obvious, however, that if the plaintiff was guilty of negligence which contributed to his own injuries, there would be no liability to him.

The final contention of the plaintiff is that "the findings of the court were inconsistent with the pleadings and contrary to law, and the findings, holding plaintiff guilty of contributory negligence, were not justified in law." The findings were consistent with the pleadings and were not contrary to law. As already stated, the evidence is not before us, and we are unable to determine from the record whether the findings holding plaintiff guilty of contributory negligence were justified, but we must rely upon the presumption that they were.

Judgment affirmed.

We concur: WOOD, J., and FRICKE, Justice pro tem.

9 Cal.App.2d 117

FOSS et al. v. CENTRAL PACIFIC R. CO. et al.

Civ. 5397.

District Court of Appeal, Third District, California.

Sept. 6, 1935.

1. Tenancy in common ⇨**13**

Possession of one cotenant is possession for all, unless there has been an actual or constructive ouster of other cotenants.

2. Mines and minerals ⇨**49**

Where cotenants entered under color of title based on decree of distribution of deceased's estate, but none of their acts of possession were adverse to reservations of mineral rights in deed to deceased, entry under color of title *held* not an ouster as to mineral rights reserved.

3. Mines and minerals ⇨**49**

Where title to mineral rights has been severed from title to surface, possession of surface by its owner is not adverse to owner of minerals, and surface owner cannot acquire title to minerals by adverse possession based on his exclusive and continued occupancy of surface alone.

4. Mines and minerals ⇨**49**

Payment by owner of surface rights in land of taxes on lands containing minerals *held* not to constitute adverse possession of mineral rights, since failure of owner of minerals to pay taxes thereon is not in derogation of his claim to their ownership, where minerals are not assessed, and taxes charged against land are not increased by reason of existence of minerals.

5. Mines and minerals ⇨**49**

Where patentees of placer claim by deed severed title to surface from underlying minerals reserving mineral rights, successors in interest of patentee of surface title who were also cotenants of record of mineral rights and easements *held* not to acquire title by adverse possession against their cotenants of mineral rights and easements by exclusive and continued occupation of surface for agricultural purposes by prescriptive period under color of title of decree of distribution purporting to distribute to them property in fee (Civ. Code, §§ 806, 811).

6. Mines and minerals ⇨**55(7)**

Mineral rights and easements reserved by original deed *held* not lost by nonuser, since, where easement has been acquired by deed, no length of time of mere nonuser will operate to impair or defeat such right (Civ. Code, §§ 806, 811).

7. Mines and minerals ⇨**49**

Establishment by successors in interest of grantees of surface title, who were also cotenants of owners of mineral rights and easements, of family cemetery on land *held* not to constitute an assertion of rights in minerals, especially where it was not shown that cemetery would interfere with mining operations.

8. Adverse possession ⇨**117**

Finding that plaintiffs had been in actual possession of property and had claimed during that time to own property in fee against world *held* not contradictory to finding that plaintiffs had not been in exclusive and adverse possession of such property during any time, where court also found that plaintiffs' possession was not exclusive and adverse to mineral rights in such property owned in cotenancy with defendants.

Appeal from Superior Court, Sutter County; Henry B. Neville, Judge.

Suit to quiet title by Lemuel D. Foss, executor of the estate of Henry M. B. Foss, deceased, and another, against Central Pacific Railroad Company, Thomas A. Steel, and others. From an unsatisfactory judgment, plaintiffs appeal.

Affirmed.

Pierce & Sherwin, of Oakland, for appellants.

Homer Lingenfelter, of Marysville, for respondents.

ROSS, Justice pro tem., delivered the opinion of the court.

Appellants sued to quiet title. Respondents asserted an interest in that part of the property involved in this appeal. As to that part of the property the judgment of the trial court was that appellants were the owners, subject to certain rights, easements, and privileges owned by appellants and the nine respondents as tenants in common, a $^{369}/_{540}$ interest belonging to appellants and a $^{19}/_{540}$ interest to each of said respondents. From this portion of the judgment the appeal is taken.

The land was originally a patented placer mining claim. In 1878 the patentees deeded a part of it to three Fosses, predecessors of appellants, specifically reserving the mineral rights and necessary easements for mining. They also conveyed a limited right to use the remainder for "pasturage, meadow and other agricultural purposes," and providing that mining operations were not to be interrupted, obstructed, or interfered with.

Mulbry Foss at the time of his death was the record owner of the title granted by the deed of 1878 and also a $^{369}/_{540}$ interest in the mineral rights and easements. Respondents succeeded to a $^{19}/_{540}$ interest each in the latter rights from their deceased father, who owned of record a $^{171}/_{540}$ interest in said mineral rights and easements.

In the Mulbry Foss estate proceedings, in 1920, by decree of distribution, the land in question was distributed as one of the assets of his estate, without any mention of the mineral rights and easements, to appellants and a predecessor in interest of appellants.

Appellants then (in 1920) entered into possession and continued in possession, claiming to own said land in fee, in apparent good faith. They paid the taxes on the land, made improvements, used a small portion for a family cemetery, granted a right of way for a county road, inclosed the land with fences and excluded trespassers, and leased the property at times for pasturage and grazing. This action was commenced in December, 1930. Respondents in their answer asserted the $^{19}/_{540}$ interest of each of them.

The question before this court has been aptly put by respondents in their brief.

"Where patentees of a placer claim by deed severed the title to the surface from the underlying minerals reserving to themselves the mineral rights together with appurtenant easements, can successors in interest of the grantees of the surface title, who are also cotenants of record of the mineral rights and easements, acquire title by adverse possession against their co-tenants of record of the mineral rights and easements by exclusive and continuous occupation of the surface for agricultural purposes for the prescriptive period under color of title of a decree of distribution purporting to distribute to them the property in fee?"

[1] Appellants and respondents were cotenants of the mineral rights and easements. In cotenancy the possession of one is possession for all, unless there be an actual or constructive ouster. Packard v. Moss, 68 Cal. 123, 8 P. 818.

[2] Appellants entered under color of title based on the decree of distribution in the Mulbry Foss estate, but none of their acts of possession have been adverse to the reservations in the deed of 1878. This entry under color of title was not of itself an ouster as to the mineral rights reserved. In Bath v. Valdez, 70 Cal. 350, 11 P. 724, cited by appellants, the adverse claimant's holding under color of title of a deed was plainly an ouster of the record cotenants.

[3] Where the title to the mineral rights has been severed from the title to the surface, possession of the surface by its owner is not adverse to the owner of the mineral below it. The surface owner cannot acquire title to the minerals by adverse possession based on his exclusive and continued occupancy of the surface alone. 13 A. L. R. 375, note III; Crowe Coal & M. Co. v. Atkinson, 85 Kan. 357, 116 P. 499, Ann. Cas. 1912D, 1196.

[4, 5] The act of the surface owner in paying the taxes on the land containing the minerals does not constitute adverse possession of the minerals. Pond Creek Coal Co. v. Hatfield (C. C. A.) 239 F. 622. The fact that the owner of the minerals does not pay the taxes on the minerals is not in derogation of his claim to their ownership, where the minerals are not separately assessed, and the taxes charged against the land are not increased by reason of the existence of the minerals. Crowe Coal & M. Co. v. Atkinson, supra. These rules seem to apply to the facts of the instant case.

[6] The mineral rights and easements reserved by the deed of 1878 were not lost by nonuser (sections 806 and 811, Civ. Code). "The easement having been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right." Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 P. 900, 903.

[7] None of the various acts of possession and ownership by the appellants has

been adverse to the rights of respondents to the subsurface minerals. The establishment of the family cemetery is urged as a strong point, but there is no assertion of rights to the minerals in this act, and there is no showing that it would even interfere with mining operations.

Appellants complain of contradictory findings. The court found that plaintiffs "have been in the actual possession of all the real property described in the complaint continuously for more than twenty years prior to and up to the filing of the complaint in this action, and have claimed during all of said time to own the same and the whole thereof in fee simple absolute against the whole world." The court then found that it was not true that plaintiffs "have been in the exclusive and/or adverse possession of the real property in said complaint described in said parcel No. 1 for * * * or during any period of time, or at all."

[8] These findings harmonize when examined in connection with the facts of the case. The court found the admitted fact that appellants were in actual possession, claiming to own in fee, but that it was not exclusive or adverse as to mineral rights owned in cotenancy with the respondents.

The judgment is affirmed.

We concur: PULLEN, P. J; THOMPSON, J.

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9 Cal.App.2d 213

PRICE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 10173.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1935.

Hearing Denied by Supreme Court
Nov. 18, 1935.

1. Master and servant 🔑398

In case of latent disease, such as silicosis, caused through conditions of employment, limitations for compensation purposes begin running when presence of disease is, or should be, diagnosed as primary and efficient cause of injury (St. 1917, p. 841, § 11, amended by St. 1931, p. 2372).

2. Master and servant 🔑398

Where claimant, whose work had exposed him unnecessarily to draughts of cold air and silicate dust, developed cough, and on consulting physician, after termination of his employment, was advised he had slight inflammation of lungs, but later was advised he suffered silicosis resulting from former conditions of employment, proceeding brought within six months after physician properly diagnosed case *held* not barred by limitations (St. 1917, p. 841, § 11, amended by St. 1931, p. 2372).

Proceeding under the Workmen's Compensation Act by Charles Price, claimant, opposed by the American Motorists Insurance Company, insurer. On petition for writ of review of award of Industrial Accident Commission dismissing the claim.

Award set aside.

Joseph L. Fainer, R. E. Parsons, and Louise A. Steele, all of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Commission.

Willis I. Morrison, Herlihy & Herlihy, F. B. McConnell, Richard L. Oliver, C. W. Stopp, James E. Minds, and C. W. Bowers, all of Los Angeles (Willis I. Morrison, F. B. McConnell, and E. Herbert Herlihy, all of Los Angeles, of counsel), for respondent insurance carriers.

FRICKE, Justice pro tem.

Petitioner was employed by the Empire China Company in a branch of its operations which subjected him to the dust of burnt clay and other vitrified products coming from machines not properly safeguarded against and disseminating such dust, and was also exposed, unnecessarily, to water upon the floor, at times ankle deep, draughts of cold air, and silicate dust raised by sweeping. After several years of employment and beginning early in 1927, petitioner developed a cough. This condition progressed and he developed a tiredness and weakness which, toward the end of his employment, required him to lie down upon arriving home from his work. Petitioner's employment terminated when his employer ceased business on about November 22, 1933. He did not consider his condition sufficiently serious to require medical attention until February, 1934, when he consulted a physician who advised him that he had a slight inflammation of the lungs from which he would soon recover. The following month petitioner was injured in an automobile accident, and his attending physician, in addition to some traumatic injuries found a tubercular condition. On May 16, 1934, an X-ray examination disclosed advanced pulmonary tuberculosis and that some of the lesions resembled silicosis, a disease due to silicate dust; the latter diagnosis being later confirmed by attending physicians and not disputed by respondents. This diagnosis and the fact that he had silicosis first became known to petitioner on May 30, 1934. On June 22, 1934, he filed with the Industrial Accident Commission his application for compensation. After taking testimony of petitioner and his wife and certain other evidence, the referee of the commission gave notice to the parties hereto that the case would be submitted for decision on the issues of statute of limitations and prejudice from lack of notice to the employer, and thereafter made findings that: "By the exercise of reasonable care and diligence petitioner should have disclosed the character of his condition prior to the date of final termination of work and that he failed to give notice of the injury to his employer within thirty days, and the employer was prejudiced in the investigation and defense of the claim." On the basis of the finding and conclusion that the claim was barred by the statute the case was dismissed. Petitioner then applied for a rehearing, which was denied.

[1] The statutory limitation of six months, relied upon by respondents, begins to run with "the date of the injury" (section 11, Workmen's Compensation Act [St. 1917, p. 841, amended, St. 1931, p. 2372]), and in cases of the character here before us the date of injury is not the date of the last or of any particular exposure to the dust but "the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment." Marsh v. Industrial Accident Commission, 217 Cal. 338, 351, 18 P.(2d) 933, 938, 86 A. L. R. 563. In the latter case the court disapproved the holding of the commission that the statute of limitations began to run as of the date the employee first was disabled from work, and indicates that in cases of this type the running of the prescription period begins when the presence of silicosis was or should have been diagnosed as the primary and efficient cause of the injury. It appears quite obvious from the evidence that petitioner, from the inception of his cough until he received the X-ray report on May 30, 1934, had no idea or reason to believe that he was suffering from a compensable injury, silicosis, arising out of and incurred in the course of his employment. Even his visit to a physician in February of 1934 disclosed nothing further than the given diagnosis of a slight inflammation of the lungs from which a speedy recovery was assured.

[2] An employee is not to be deprived of compensation because he incorrectly diagnoses his condition (Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.(2d) 142; Singer v. Industrial Accident Commission, 105 Cal. App. 374, 287 P. 567), and, as it now concedes, the Industrial Accident Commission herein erred in its finding that the petitioner should have discovered the character of his condition prior to the date of his final termination of work. Such finding is without support in the evidence. It is wholly unreasonable to argue, as to the respondent insurance carriers, that the employee should, through the exercise of reasonable care and diligence, have known in November of 1933 that which his medical adviser did not discover in February of 1934. It is argued that the finding finds support in a portion of petitioner's application for compensation which is capable of being construed as a declaration that "on condition first discovered about November, 1933," he "sustained injury arising out of and in the course of the employment as follows: Silicosis caused by getting dust from china in lungs." It suffices to answer that while it is obvious that petitioner was aware of his "condition" of coughing and weakness in November, 1933, the "injury," silicosis, was not discovered until practically six months later. Respondent insurance carriers rely upon a six months' period of limitation, a contention which would raise the bar if the date of injury was prior to December 22, 1933. The statement "about November, 1933," is broad enough to include the entire month of December, and cannot be tortured into an admission that the injury occurred prior to the 22d of that month.

No point is made that the employer suffered any prejudice from lack of earlier notice, and we find no basis for such a finding in the record.

It is ordered that the award of the Industrial Accident Commission dismissing the claim of petitioner be set aside and that said commission proceed with a determination of said claim in accordance with the views herein expressed.

We concur: CRAIL, P. J; WOOD, J.

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9 Cal.App.2d 182

CHAPLIN v. CHAPLIN.

Civ. 1712.

District Court of Appeal, Fourth District, California.
Sept. 16, 1935.

Divorce 🔑186

Modification of judgment of trial court in proceeding by parties to divorce action to secure judicial interpretation of property settlement, executed by such parties and incorporated in final decree rendered in divorce action, agreed upon by parties pending appeal from trial court's judgment, was accepted by appellate court and judgment affirmed as so modified.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceeding by Lillita Louise Chaplin against Charles Spencer Chaplin. From an adverse judgment, defendant appeals.

Affirmed as modified.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

Edwin T. McMurray, of San Francisco, for respondent.

JENNINGS, Justice.

This is an appeal by the defendant, Charles Spencer Chaplin, from the judgment of the superior court of Los Angeles county in a proceeding instituted jointly by the defendant and by plaintiff, Lillita Louise Chaplin, the former wife of said defendant. The object of the proceeding was to secure judicial interpretation of a certain property settlement agreement theretofore executed by the above-named parties and incorporated in the final decree rendered in the divorce action between the parties.

It is now made to appear that, during the pendency of this appeal, the parties have reached an agreement with respect to the meaning and interpretation of the above-mentioned property settlement agreement and have expressly agreed that the judgment of the trial court shall be modified in the following particulars: First, finding No. 1, as the same is set forth in the judgment, is stricken therefrom, and in lieu thereof the following finding is incorporated: "1. That the said property settlement agreement by its terms permits the said Charles Spencer Chaplin, the trustor, in the creation and establishment of said trust and trust fund, to provide by his declaration of trust for the reservation of the right in him, during his lifetime, to determine and direct the investment of the said trust fund and to require the trustee to make investments of said fund as the said trustor shall determine and direct."

Second, finding No. 3, as set forth in the judgment, is stricken therefrom, and in its place the following finding is substituted: "3. That the declaration of trust attached hereto and made a part of this order, judgment and decree setting forth the terms, conditions and provisions for the creation and establishment of the trust and trust fund contemplated and provided for by said property settlement agreement, and the investment, management, administration thereof, and the disposition and distribution of the income and corpus thereof, is to all intents and purposes in accordance with the terms, conditions and provisions of the said property settlement agreement with respect thereto; and the execution of the said declaration of trust by the said Charles Spencer Chaplin and the creation of the said trust and trust fund in accordance with its terms, conditions and provisions, will constitute a full compliance with the terms, conditions and provisions of said agreement, providing for and with respect to the creation and establishment of said trust and trust fund of $200,000.00; and the deposit with the said trustee or the retention by said trustee of the said sum of $200,000.00 under the terms, conditions and provisions of said declaration of trust, to be held and administered upon the uses and trusts therein specified, shall and will constitute a full release and discharge of the said Charles Spencer Chaplin of and from all and every obligation and duty to create and/or establish the trust or trust fund to be created by him pursuant to the terms, conditions and provisions of the property settlement agreement between said parties."

Third, subdivisions (d) and (e) of the judgment are stricken therefrom. Fourth, subdivision (f) of the judgment is stricken therefrom, and in its place the following subdivision designated (d) is substituted:

"(d) That upon the execution and delivery of said declaration of trust by said Charles Spencer Chaplin as aforesaid, and the acceptance thereof by said Citizens National Trust & Savings Bank, said bank having on deposit at said time the said sum of $200,000.00 theretofore deposited with it by the said Charles Spencer Chaplin, or the said sum of $200,000.00 deposited with said bank at the time of the acceptance of said declaration of trust by said bank, as the trust fund subject to the said declaration of trust, and the approval of the terms and conditions of said declaration of trust by said Lillita Louise Chaplin, as being in conformity with the said property settlement agreement, the said Charles Spencer Chaplin shall be, and he hereby is, fully discharged of any and all obligation under said property settlement agreement, or otherwise, to create the trust or trust fund for the benefit of the said minor children as provided in said property settlement agreement, or to comply further with any term, condition or provision of said property settlement agreement with respect to the creation of such trust or trust fund."

Fifth, the form of declaration of trust attached to and made a part of the judgment is stricken therefrom, and in its stead the following form of declaration of trust is substituted:

"Declaration of Trust.

"Know All men by These Presents: That the Citizens National Trust & Savings Bank of Los Angeles, a national banking association, with its principal office at Los Angeles, California, hereinafter called Trustee, does hereby admit, certify and declare that Charles Spencer Chaplin, a resident of Beverly Hills, California, hereinafter called Trustor, has conveyed, transferred and delivered to the said Trustee, the sum of Two Hundred Thousand Dollars ($200,000.00) lawful money of the United States.

"It is agreed that no consideration was given by the said Trustee for the delivery to it of said sum of money, and that the same has been so received and accepted by it, and will be hereafter held by it in trust, under the terms and conditions set forth in this Declaration, for the following uses and purposes, and subject to the conditions and reservations and upon the trusts following, to-wit:

"Article I. It is an express condition of this trust that the Trustee shall not be responsible nor assume any liability for the nature, value or extent of its title to any sum of money accepted in trust hereunder, nor for any adverse or conflicting claims of interest therein of other persons, but that its only liability shall be for such right, title and interest as it may have received or may hereafter acquire in said sums or future sums of money that may be delivered to it hereunder, and for such sums as it may collect from the corpus of the trust estate.

"Article II. Said Trustee is authorized and empowered to retain and hold, subject to the provisions hereof, said sum of money as well as any additional sums which may be by the Trustor or otherwise, from time to time, added to the principal of this trust, as hereinafter provided, at the risk of the trust estate and not at the risk of the Trustee. Said Trustee is hereby given the power of sale and exchange in connection with securities from time to time comprising the principal of this trust, and is authorized and empowered from time to time, subject to the limitations and restrictions hereinafter set forth, to invest, reinvest, loan and reloan, the proceeds and cash principal in selected securities, properties and investments consisting of revenue producing properties in areas demonstrated as well established and within the direct lines of expansion or in valid Bonds of the United States Government, or securities and stocks of companies developing the so-called necessities or luxuries of life and business having a proven income record of soundness and stability suitable for investment of trust funds, except as hereinafter provided, and upon such terms and conditions as said Trustee may deem to be for the best interests of this trust; said Trustee to use every reasonable precaution to protect all persons interested in this trust from loss by reason of such loans or investments.

"During the lifetime of the Trustor, Charles Spencer Chaplin, no sale or exchange of property which may at any time comprise the principal of the trust estate, and no change in the investment of the principal of the trust estate shall be made by the Trustee except upon written order and direction of said Trustor, or his agent authorized by him in writing to give for and on behalf of the Trustor, such written order and/or direction, and the said Trustor, during his lifetime hereby reserves for himself the right to direct from time to time, in writing, said Trustee as to the investment of all cash principal in any securities and/or property, whether or not the same may be approved and/or permissible by law for investment of trust funds under the law controlling the investment of trust funds for national banks, or state banks, if the Trustee at any time be a state bank. After the death of said Trustor, the aforesaid rights reserved to the Trustor to direct said Trustee as to the investment of all cash principal shall be exercised by the duly appointed and qualified executor or executors of the estate of Charles Spencer Chaplin, the Trustor herein, subject, however, to the approval of the Trustee; but said investments when so made shall not be restricted to investments permissible by the law for investment of trust funds under the law controlling the investment of trust funds for national banks, or the Trustee. After the said executor has or executors have been discharged, and until the time when the younger of said children shall have attained his majority, the Trustee shall only sell, exchange, invest and reinvest in such securities, as hereinabove provided for, by and with the approval of the guardian of the estates of said children or such agent or attorney as is duly authorized in writing to act for said guardian. After the younger of said children shall have attained his majority, if the Trustor be then deceased, any and all investments by the said Trustee shall be made by and with the approval of the said children, or by a person or persons selected and given written authority by said children for that purpose. Notwithstanding anything herein to the contrary, said Trustee shall invest neither principal nor income from the corpus of said trust estate, in any securities underwritten by the said Trustee, or in which the said Trustee is directly or indirectly interested.

"Said Trustee may, if it so elects, cause such properties, securities and shares of corporate stock that may hereafter become subject to this trust, to be transferred into the name of the Trustee, as Trustee under its Trust Number ......, and either name the beneficiaries in the corporate certificates, and/or furnish said corporation with the names of the beneficiaries and/or a certified copy of this Declaration of Trust; or hold said corporate stock in this trust without transferring it to its name, and/or it may hold the same in the name of the Trustor.

"All dividends accruing on shares of the capital stock of any corporation which form a part of the principal of the trust estate and payable in shares of such corporation, shall be deemed income. Where the Trustee shall have the option of receiving a dividend either in cash or in shares of the declaring corporation, it shall be considered cash dividend and deemed income irrespective of the choice made by the Trustee. Stock dividends shall be sold upon receipt by the Trustee, and shall be considered cash income. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares in such corporation and the proceeds of any sale of such rights, shall be deemed income if purchased out of funds derived from income but if purchased with cash taken from the corpus of the trust or profits derived therefrom it shall be deemed principal.

"Said Trustee is directed to charge all premiums on investments against principal and to credit all discounts on investments to principal. In all other cases said Trustee is hereby vested with absolute and uncontrolled discretion and power to determine what shall constitute principal of the trust estate or the gross income therefrom, or net income available for distribution under the terms of this trust; and it may also, at its discretion and after first obtaining the written consent of the Trustor, if living, improve any real property subject to this trust, or rebuild, or alter, or repair any improvements thereon, of such character, amount, cost, and from such funds or property subject to this trust as it may deem advisable, and which the Trustor may first approve.

"Said Trustee may loan or advance its own funds to the trust estate for any purpose for the protection of any capital investment for the trust estate, at prevailing rates of interest, which loan or advancement shall thereupon become a first lien on the entire trust estate as to both principal and income, and be repaid to said Trustee before any other payments or distributions herein provided for shall be made.

"Article III. If the Trustee hereunder shall resign under the right so to do which it hereby expressly reserves for itself and its successor and/or successors in office, the successor of said Trustee shall be designated by the Trustor, if he then be living; provided, however, that such successor Trustee shall be a bank and/or trust company having its principal place of business in the City of Los Angeles, California; if the Trustor be not then living, the appointment shall be made by a court of competent jurisdiction in the County of Los Angeles, State of California, subject to the above limitation, acting upon or in response to the petition of the resigning Trustee and/or any beneficiary.

"Article IV. The trusts hereunder created and declared shall be subject to the following conditions and agreements:

"(a) If any provision of this agreement shall be found invalid, such invalidity shall be without effect upon any of the other provisions hereof, and each and every valid provision and agreement hereunder shall be deemed separate and distinct from any valid provision.

"(b) Any tax arising upon the transfer, vesting or passing of any interest in the trust estate shall be paid out of the income and/or principal of the taxable share or interest. All other taxes payable shall be paid out of income as long as there is sufficient income on hand to meet such purposes; in the event there should not be sufficient income, then in that event, said Trustee may in its discretion, pay the same from the principal, and the same shall be charged by the Trustee to the respective interest of the beneficiary as in its discretion it deems fair and equitable.

"(c) Whenever the trust estate, or any portion thereof, shall be distributable, the Trustee shall transfer and deliver to any beneficiary entitled to receive the same, the trust estate or such portion thereof, in the form then held in the trust estate.

"(d) In all matters of interpretation, whenever necessary to give effect to any provision of this agreement, the masculine shall include the feminine and the singular shall include the plural.

"(e) This trust has been created, declared and accepted by the Trustee in the State of California, and shall be interpreted and enforced in accordance with the laws of the State.

"(f) Each and every beneficiary of the trusts hereunder created and declared, including the Trustor, shall have no right, title or authority to assign, transfer, hypothecate or otherwise anticipate, impair or encumber his or her beneficial and/or legal interest in the trust estate, and no instrument of attempted assignment, transfer or hypothecation thereof shall be effective for any purpose whatsoever, and neither the principal nor the income of the trust estate, nor any part thereof, shall be liable for the debts of any beneficiary nor be subject to attachment, execution or other process of any court.

"(g) It is agreed that the Trustee shall not be responsible for any act or omission hereunder unless same constitutes unreasonable negligence, nor shall it be required to bring or defend suit hereunder, unless indemnified to its own satisfaction.

"Article V. From the gross income derived from the trust estate and/or principal, if necessary, the Trustee shall first pay and discharge, as and when due, any and all taxes, assessments, advancements and other expenses of every kind and nature expended or incurred in the management and protection of the trust estate and of this trust, but not, however, the payment of any income taxes, inheritance taxes and/or estate taxes levied or assessed upon the trust estate and/or the beneficiaries hereunder or the income therefrom, and shall, after sufficient cash or other securities have been deposited in this trust so that the income therefrom shall be sufficient, also pay to itself a compensation for its own services as Trustee, as follows:

"(a) A sum equal to one-tenth of one per cent (1/10 of 1%) of the reasonable value of any additions that may be hereafter made to the principal of this trust. Minimum fee Twenty-five Dollars ($25.00).

"(b) An annual compensation, payable quarterly, equal to one-half of one per cent (½ of 1%) of the reasonable value of the principal of the trust estate, for its ordinary and usual duties as said Trustee.

"(c) A sum equal to one per cent (1%) of the reasonable value of the principal of the trust estate for the termination, distribution, closing and settlement of this trust according to the terms hereof.

"(d) A reasonable compensation for any unusual or extraordinary services rendered by it as Trustee hereunder, to be fixed by court.

"Article VI. Whereas, that certain property settlement agreement hereinafter referred to between Lillita Louise Chaplin and Charles Spencer Chaplin, provides that if and in the event the said children, or either of them, should be employed, engaged, or apprenticed or hired out, then any and all earnings or compensation to which said children or either of said children shall be entitled during their respective minority, or shall receive or which shall be paid for their and each of their services, of whatever nature, kind and description, shall, during the minority of each respective child, be added to each child's respective interest in the corpus of the trust estate hereby created; now, therefore, said Trustee agrees that if and when it shall receive payments from or on account of any services of any nature rendered by said children, or either of them, it shall and will receive and accept the same as an addition to the corpus of this trust estate; provided, however, that the method adopted for handling and accounting for the earnings of each of said children added to the corpus of the trust estate as aforesaid, shall be such as will provide a separate accounting of such earnings and the income therefrom, to the end that each child shall receive distribution of the earnings contributed by him to the trust estate, and any and all income which may accrue therefrom; and, provided, further, however, that if the method of accounting employed by the Trustee at the time of any such addition of earnings to the corpus of the trust estate shall be such as to necessitate a change of method in order to comply with the foregoing provisions of this paragraph, then, and in that event, the method of accounting as to the whole of the corpus of the trust estate shall be made such as to keep the contributions to the corpus of the trust estate by the Trustor and the children, respectively, and the respective income derived therefrom, segregated; and in the event that earnings of said children, or either of them, are contributed to the corpus of the trust estate, the Trustee shall notify the Trustor of that fact, and of the amount so added or contributed, in writing, and in such written notice shall designate the date of contribution and by whom paid, and to which of said children the contribution is to be credited, and such notice shall be addressed to Loyd Wright, 1125 Board of Trade Building, Los Angeles, California, until and unless the Trustor shall designate in writing some other person and/or address.

"Nothing herein contained, however, shall impose, or be deemed to impose, any liability on the Trustee for the failure, neglect or refusal of the person or persons having control of any such earnings or compensation, to add the same to the corpus of this trust; nor shall any income derived from such earnings or compensation of said children affect the obligation of said Trustor to contribute, during the minority of said children respectively, a sum sufficient to make a total distribution of $500.00 each month for each of said children, as hereinafter in Article VIII provided.

"Article VII. The entire net income received and derived from the trust estate and available for distribution hereunder, shall be paid by said trustee to said children in monthly installments, as follows:

"(a) During the minority of each of said Charles Spencer Chaplin, Jr., and Sydney Earl Chaplin, the sum of Five Hundred Dollars per month shall be paid to each of them, as income received and derived from funds or property contributed to the corpus of the trust estate by the Trustor, and/or under his obligation to make contributions thereto as hereinafter provided in Article VIII; and in addition thereto, the said Trustee shall pay to each of said children the income received and derived from his respective contribution of earnings to the corpus of the trust estate, if any. In this connection, said payments, as well as any and all other payments of money to be made to said children, or either of them, during their respective minority, shall be made to the duly appointed, qualified and acting guardian of the estate of said respective children. Any net monthly income derived from the funds or property contributed by the Trustor to the corpus of the trust estate, in excess of the monthly installment payment of $500.00 provided to be made to each of said children therefrom, and any deficiency in said net income to make such monthly installment payments, shall be disbursed, and/or made up, as the case may be, as hereinafter in Article VIII provided. When, and as, each of said children reach the age of majority, the portion of net income distributable and payable to them respectively hereunder, shall be paid to them directly by the said Trustee; and any earnings contributed to the trust estate by said children respectively, or either of them, if any, together with any undistributed income therefrom, shall be turned over by said Trustee to the child contributing the same.

"(b) Should both of said children live until the younger thereof shall reach the age of thirty-five (35) years, then, and in that event, and thereupon, this trust shall cease and terminate; and the then corpus of the trust estate, together with any undistributed income therefrom, shall be divided between and distributed to said children, share and share alike.

"(c) In the event of the death of either of said children prior to the time that the younger thereof shall have attained the age of thirty-five (35) years, then and in that event, and thereupon, this trust as to one-half of the corpus thereof contributed by the Trustor, and one-half of any undistributed net income, shall cease and terminate and the said corpus and income shall immediately vest in the then heirs at law of such deceased child, in accordance with the laws of succession of the State of California now in force and effect, to all intents and purposes the same as though the said trust had terminated by expiration of time, as provided in sub-paragraph (b) of Article VII, hereinabove set forth, and the Trustee shall pay over, deliver, transfer and assign said corpus and income of said trust estate to the duly appointed, qualified and acting executor or administrator of the estate of such deceased child; provided, however, that if such death shall occur before such child shall have reached the age of majority, and additions or contributions to the corpus of the trust estate which may have been made by such child, together with any undistributed income which may have accrued thereon or been derived therefrom, shall also vest and be paid over, delivered, transferred and assigned as aforesaid.

"It is expressly provided that upon the death of either of said minor children of the Trustor herein, then and thereafter the Trustor herein shall be relieved from any and all obligations to pay any contribution to the income derived, or to be derived from the corpus of the trust estate contributed by him and so held in trust, as far as the interest of said deceased child is concerned.

"Should the younger of said children die before becoming thirty-five (35) years of age, leaving him surviving the elder of said children, then, and in that event, this trust shall terminate, as to the elder of said children, when said surviving child shall reach the age of thirty-five (35) years; or upon his earlier demise, whichever event shall first occur.

"Article VIII. The Trustor declares that he is the father of Charles Spencer Chaplin, Jr., and Sydney Earl Chaplin; that he and the mother of said children, Lillita Louise Chaplin, are divorced, and that this Declaration of Trust is made pursuant to and in full compliance with that certain contract or agreement entered into between Charles Spencer Chaplin, as First Party, and Lillita Louise Chaplin, as Second Party, under date of August 19th, 1927, which agreement was approved by Hon. Walter Guerin, Judge of the Superior Court of Los Angeles County, California, under date of August 22nd, 1927, in that certain divorce proceeding then pending between the parties, entitled Lillita Louise Chaplin, Plaintiff, v. Charles Spencer Chaplin, Defendant, No. D-52298, of the Superior Court of the State of California, in and for the County of Los Angeles.

"Article IX. The Trustee shall pay from the net income of said trust estate, Five Hundred Dollars ($500.00) to each of said children for each calendar month during the minority of each of said children, as provided in sub-paragraph (a) of Article VII of this Declaration of Trust; provided, however, that if the cash on hand in the income account is insufficient in any calendar month to pay each of said children said $500.00, the Trustor will, upon demand of the Trustee, pay to the Trustee to be disbursed to the guardian of each of said children, as hereinbefore provided, sufficient funds so that each of said children shall receive $500.00 for each calendar month. The surplus net income for each calendar month from the trust estate over and above $500.00 for each of said children, if any, shall be carried over in said income account to make the following monthly payments during that fiscal year. At the end of each fiscal year as hereinafter defined, the Trustee shall repay to the Trustor from the cash on hand in said income account, if any, such sum as remains in said income account not to exceed the aggregate amounts advanced by the Trustor to the Trustee to assure the payment on behalf of each of said children of $500.00 for each calendar month during each fiscal year, (as hereinbefore in this paragraph provided). The surplus remaining, if any, after the foregoing deductions, shall be paid to the guardian of said children, as herein provided for, all payments to be made to said children. It is expressly provided, however, that if at the end of any fiscal year, there is not sufficient cash in the income account to pay to the Trustor any moneys that he may have, during said fiscal year, advanced to the Trustee as in this paragraph provided, then the Trustor shall and does hereby waive the payment to him of the difference between the cash in the income account paid to him, if any, and the total of the advances made by him during said fiscal year. In this connection, the first fiscal year, as used and referred to in this Declaration of Trust, shall be deemed to have commenced as of September 1st, 1932, and each successive September 1st of each successive year thereafter, during the life of this Declaration of Trust.

"It is expressly provided that all obligations of the Trustor herein to guarantee the payment of or to contribute to the net income payable or distributable to said minor children and each thereof, shall cease and determine, as to each of said minor children, when such minor child shall have attained the age of majority. For example, when the older of said children shall have attained his majority, the obligation of the Trustor herein to guarantee the payment or contribute to the net income payable or distributable to said child, shall thereupon cease and determine, and when the younger of said children shall have attained his majority the obligation of the Trustor to guarantee payment of or contribute to the net income payable or distributable to said child, shall likewise cease and determine, and in the event of the death of either or both of said minor children prior to the time he or they shall have attained his or their majority, the obligation of the Trustor to guarantee the payment of or contribute to the net income otherwise payable to such deceased child, if he had lived, shall thereupon cease and determine.

"Article X. The Trustor reserves the right to add to the corpus of the trust estate from time to time as he may elect, without incurring any obligation to do so. While this trust is an irrevocable trust the right is also hereby reserved unto Trustor to amend this Declaration of Trust from time to time, by writing duly signed and acknowledged by him, when filed with the Trustee and approved in writing by the guardian of the estate of said children during the minority of said children, and after either or both of said children may have attained majority, with their consent; provided and conditioned, however, that any amendment hereto during the minority of any such child, shall be subject to the approval and ratification of a court having jurisdiction of the guardianship estate or estates of such child or children.

"Article XI. It is expressly understood that this Declaration of Trust is executed, and the Trust Fund and Estate created by the Trustor is created, in pursuance of and as being agreeable to the terms of the aforesaid property settlement agreement of August 19th, 1927, and in full reliance upon the express provisions contained in said agreement, and in the belief and with the intent that the spirit of said agreement and all of its terms, conditions and provisions shall and will at all times be fairly and faithfully carried out by both parties thereto and hereto.

"Article XII. The undertaking and obligations of the Trustor herein, whereby an income for each of said minor children of not less than $500.00 per month during their minority is guaranteed from the trust estate hereby created, shall be, and it hereby is, made binding upon the heirs, administrators, executors, successors and assigns of the said Trustor.

"Article XIII. Notwithstanding anything herein to the contrary, this trust shall terminate upon the death of the last survivor of the Trustor, Charles Spencer Chaplin, and the beneficiaries herein, Charles Spencer Chaplin, Jr., and Sydney Earl Chaplin, all of whom are now living, and the trust estate and the property thereof shall thereupon be distributed as hereinbefore provided.

"In witness whereof, said Citizens National Trust & Savings Bank of Los Angeles, as Trustee, has caused its corporate name to be subscribed and its corporate seal to be affixed hereunto by its Vice-President and Assistant Trust Officer thereunto duly authorized, as of the 1st day of September, 1932, at Los Angeles, California.

"Citizens National Trust & Savings
Bank of Los Angeles, as
Trustee,
"By ....
Vice President,
"And ....
Assistant Trust Officer.
"Charles Spencer Chaplin,
Trustor,
....

"I, the undersigned, Charles Spencer Chaplin, do hereby certify that I am the person named in the above and foregoing Declaration of Trust and therein called Trustor; that I fully understand that this Declaration of Trust is irrevocable; that said Declaration of Trust fully and accurately sets out the terms and trusts under and upon which the property therein mentioned is to be held, managed and disposed of by the Trustee therein named, and I do hereby agree, consent to, approve, ratify and confirm the same in all particulars.

"Dated: At Los Angeles, California, this ...... day of ......, 1935.

....
Trustor

"I, the undersigned, Lillita Louise Chaplin, do hereby certify that I am the person named and referred to in Article VIII of the aforesaid Declaration of Trust, and I am the mother of Charles Spencer Chaplin, Jr., and Sydney Earl Chaplin, beneficiaries named in the aforesaid Declaration of Trust; that I have carefully read the aforesaid Declaration of Trust and the same is hereby approved by me as being in full compliance with the terms and conditions of that certain Property Settlement between myself and Charles Spencer Chaplin, referred to in Article VIII of said Declaration of Trust.

"Dated ......, 1935.

....
Lillita Louise Chaplin."

As so modified the judgment from which this appeal has been prosecuted is affirmed. Respondent to recover her costs of appeal.

We concur: BARNARD, P. J.; MARKS, J.

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9 Cal.App.2d 169

PEOPLE v. BOYD.

Cr. 2757.

District Court of Appeal, Second District, Division 1, California.
Sept. 16, 1935.

1. Jury 🔑29(2)

That defendant in robbery prosecution had previously admitted a prior conviction and judge was aware of that fact *held* not to render judge's action in trying case without a jury erroneous where stipulation had been entered into by state, defendant and defendant's counsel waiving right of trial by jury.

2. Criminal law 🔑1159(3)

Where there was direct testimony connecting defendant with commission of robbery charged, District Court of Appeal could not weigh such evidence with conflicting evidence to determine whether evidence sustained conviction.

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Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Ira Boyd was convicted of robbery, and he appeals.

Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

YORK, Justice.

On trial before the court sitting without a jury defendant was convicted upon an information charging the crime of robbery. This is an appeal from the judgment of conviction and from the order denying motion for a new trial.

[1] The first point raised by appellant is that, notwithstanding the stipulation entered into by plaintiff, defendant and defendant's counsel waiving right of trial by jury and consenting that the case be tried before the judge, it was error for the court to proceed, apparently for the reason that the defendant previously admitted a prior conviction and the judge was aware of that fact—basing his point on the contention that the court was sitting "as jury." We can find no authority either in law or in reason holding that under such circumstances it was error for the trial judge to proceed after such a stipulation was entered into.

[2] Appellant's second objection is that the judgment of the court is not sustained by the evidence. In support of this claim, reference is made to certain portions of the evidence set forth in the brief. However, there was direct testimony connecting the defendant with the commission of the crime charged in the information. We cannot weigh the evidence on this appeal.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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9 Cal.App.2d 153

Ex parte HARDER.

HARDER et al. v. LUCOT, Sheriff.

Cr. 1444.

District Court of Appeal, Third District, California.

Sept. 12, 1935.

1. Municipal corporations 🔑622

Ordinance which made picketing on highway or private property without owner's consent unlawful *held* void for indefiniteness where no definition of picketing was given in the ordinance.

2. Municipal corporations 🔑622

For ordinance against peaceful picketing to be valid, ordinance must define what acts are deemed to constitute peaceful picketing and provide for prohibition thereof.

3. Criminal law 🔑10

All public offenses or crimes in California are statutory, and court cannot have recourse to common law to determine prohibited acts.

◆

Habeas corpus proceeding by A. J. Harder and another directed against George W. Lucot, Sheriff of Amador County, California.

Writ granted.

Mark L. Burns, of Sacramento, and George G. Olshausen, of San Francisco, for petitioners.

Allen Martin, Dist. Atty., and William G. Snyder, both of Jackson, Ralph McGee, of San Francisco, G. G. Chisholm, of Jackson, and James D. Meredith, of Sacramento, for respondent.

PER CURIAM.

The petitioners were arrested upon a warrant issued by the justice of the peace of township No. 1 of the county of Amador, charging them with a misdemeanor, described as follows, to wit: "Violation of Ordinance No. 184 of the Board of Supervisors of the County of Amador, warrant dated June 5th, 1935."

While counsel in this case have argued at length, and with considerable ability the right of lawmaking bodies to prohibit peaceful picketing, and have cited a great many decisions where certain acts have been held unlawful, and certain cases wherein appears a statement that in the absence of legislation to the contrary, peaceable picketing cannot be prohibited, all of which cases we have carefully examined. Nevertheless, a consideration of ordinance No. 184 of the board of supervisors of the county of Amador precludes our expressing any opinion as to whether what counsel has called "peaceful picketing" may or may not be prohibited.

[1] The ordinance in question, as shown by section 1, being the prohibitive portion of the ordinance, is so indefinite and uncertain as to render it void. That section reads: "It shall be unlawful, in Amador County and outside of incorporated cities or towns therein, to do picketing, in connection with any strike, or otherwise, upon any public highway, or upon any private property without the consent of the owner thereof." While there may be some question as to the power of the board of supervisors to exclude people from the public highway or from using the public highway so long as they do not obstruct the free use and passage thereof by other persons, by reason of what we are about to say, it is unnecessary to decide this question. The uncertainty which renders the ordinance under consideration void is that the offense of picketing sought to be prohibited by section 1 contains no definition or description of what acts shall constitute picketing accompanied by violence.

A reference to the case of People v. Armentrout, 118 Cal. App. (Supp.) 761, 1 P.(2d) 556, appellate department of the superior court, to which our attention has been called, and upon which much of the argument of counsel is based, shows that section 1 of the ordinance upheld in that case particularly described the acts which would constitute picketing.

[2] In order to be valid as an ordinance, even against peaceful picketing, under our jurisprudence it is necessary for the ordinance to define what acts shall be deemed to constitute peaceable picketing, and providing for the prohibition thereof. The ordinance must not be so indefinite as to leave within the mind of the trial court the question as to what shall constitute the prohibited acts. The court has only to ascertain whether the prohibited acts as defined have been committed by the person charged, and then to impose the penalty provided for. Likewise, it is the right of every person to know exactly what particular acts are prohibited. Under the provisions of the ordinance before us it might be held by one justice of the peace that the mere walking along the highway and observing who were going to work at any particular place, might be denominated "picketing," and so punished, irrespective of whether any injury resulted therefrom, either to person or property, or whether any one was either oppressed or discouraged.

[3] We cannot have recourse to the common law to determine prohibited acts. This rule is clearly stated in 7 California Jurisprudence, page 841, as follows, to wit: "There is no criminal common law in California. All public offenses or crimes are statutory, and unless there is in force at the time of the commission or omission of a particular act a statute making it a crime or a public offense, no one can be adjudged to suffer punishment for its commission or omission."

That an ordinance must clearly define the acts constituting a prohibited offense for which punishment is provided further appears by section 28, found in 16 C. J., page 67, as follows: "The legislature, in creating an offense, may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result; or it may group together various means by which the end may be accomplished, and make any one of such means an offense when done to attain the object denounced by the statute." The remaining portion of the section holds that where common-law crimes have been incorporated into the criminal jurisprudence of a state, recourse may be had to the common law to determine the nature and character of the offense. This part of this section of course does not apply here.

We find further in 7 California Jurisprudence, page 843, the following: "A statute creating a crime must define it so clearly and definitely that all may know what act or omission the violation of the law constitutes, and so that the statute can be enforced. The statute must so define the offense that a person of ordinary understanding may know therefrom when he is violating its provisions," etc.

In view of what we have said, as it appears from the face of the ordinance, any discussion of what would constitute so-called "peaceable picketing" would simply be obiter.

The petition is granted; petitioners discharged; and bail exonerated.

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9 Cal.App.2d 217

INGLEWOOD PARK MAUSOLEUM CO. v. FERGUSON et al.

Civ. 10302.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1935.

Rehearing Denied Oct. 17, 1935.

Hearing Denied by Supreme Court Nov. 18, 1935.

1. Damages 🔑64

Damages recoverable for a wrong are not diminished because injured party was indemnified by insurance.

2. Damages 🔑64

Liability of notary public and her surety for damages resulting to lender from notary's illegal certification of an acknowledgment to a grantor's signature on a forged deed of trust *held* not extinguished because lender had been fully indemnified by escrow holder under title policy.

3. Acknowledgment 🔑48

Notary's illegal certification of acknowledgment of grantor's signature on forged trust deed which was placed in escrow by forger *held* proximate cause of damage to lender who deposited $23,500 with escrow holder, even though money was paid out on forged escrow instructions, as notary's act was basic proximate cause of damage.

4. Negligence ⚷61(1)

It is not essential to a recovery of damages that defendant's wrongful act be sole cause of injury, but is sufficient if it be a proximate cause which in natural course of events, either by itself or in conjunction with other causes, produced damage.

◆

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by the Inglewood Park Mausoleum Company against Marie E. Ferguson and the National Union Indemnity Company. From a judgment in favor of the plaintiff, defendants appeal.

Affirmed.

Joseph Doyle, of Los Angeles, for appellant Marie E. Ferguson.

John J. Wilson, of Los Angeles, for appellant Indemnity Co.

Mills, Hunter & Dunn and William B. Himrod, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

This is an action against a notary public and the surety on her official bond for damages suffered as the result of her certifying to an acknowledgment of a grantor's signature on a forged trust deed. Rachel Hancock was the owner of certain real estate held by her as her separate property. Without her authority her husband, Paul C. Hancock, arranged for a loan on the property, signed his name to the note and trust deed, and forged her name to these documents, which were then placed in escrow with the Title Guarantee & Trust Company. Inglewood Park Mausoleum Company, the lender, deposited $23,500 with the escrow holder with instructions to use the same, provided that within a time specified the title company issue to it its title policy showing the deed of trust. At the same time Paul C. Hancock deposited escrow instructions signed, "Rachel M. Hancock by Paul C. Hancock," deposited the note and trust deed to which he had forged the signature of his wife, and then procured the acknowledgment of the deed by appellant Marie E. Ferguson, a notary public, without the knowledge of Rachel M. Hancock and without her appearance before the notary. The deed of trust was recorded, the title policy issued, and the note delivered to respondent. All of the moneys deposited with the escrow holder were then paid out in accordance with the demands which were filed and the escrow instructions made by Paul C. Hancock. Rachel M. Hancock was unaware of any of these transactions until some time after their conclusion.

[1, 2] Appellants, without citation of authority, present the point that respondent had no cause of action; it having suffered no damage, since the Title Guarantee & Trust Company had under its title policy paid to respondent the full sum of $25,000. Appellants overlook the fact that in no sense was the insurance for their benefit, nor did this sum come from them, and that their liability for damages was not extinguished by the payment of the insurance policy. "Damages recoverable for a wrong are not diminished by the fact that the party injured had been wholly or partly indemnified for his loss by insurance effected by him and to the procurement of which the wrongdoer did not contribute." Loggie v. Interstate Transit Co., 108 Cal. App. 165, 169, 291 P. 618, quoting 8 R. C. L. 557, § 108; Clark v. Burns Hammam Baths, 71 Cal. App. 571, 575, 236 P. 152.

[3, 4] Appellants also claim that the illegal acknowledgment was not the proximate cause of the damage. Respondent parted with its money to the escrow agent in reliance upon the authenticity and value of the note and trust deed. When respondent received the note and deed, title to the money passed to the escrow holder as the agent of Paul C. Hancock, who fraudulently represented himself to be the authorized representative of Rachel M. Hancock. See Shreeves v. Pearson, 194 Cal. 699, 230 P. 448. Even before the escrow agent paid out any of the money under instructions from Paul C. Hancock, respondent had been damaged and had its cause of action against appellants. Assuming, but not conceding, that the payment of the moneys by the escrow holder could be considered one of the proximate causes of respondent's damage, the acknowledgment of the forged deed was the basic proximate cause which led to the damage, and the fact that the escrow agent thereafter paid out the funds on the instructions of Paul C. Hancock does not make the latter act the sole proximate cause of the damage. It is not essential to a recovery of damages that a defendant's wrongful act be the sole and only cause of the injury; it is sufficient if it be a proximate cause which in the natural

course of events produced, either by itself or in conjunction with other causes, the damage. See Royal Indemnity Co. v. Midland, etc., Corp., 42 Cal. App. 628, 183 P. 960; Carroll v. Central, etc., Co., 74 Cal. App. 303, 240 P. 53.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

* * *

In re LANKERSHIM'S ESTATE.*

LANKERSHIM et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 10377.

District Court of Appeal, Second District, Division 2, California.

Sept. 16, 1935.

Rehearing Denied Oct. 11, 1935.
Hearing Granted by Supreme Court Nov. 14, 1935.

1. Executors and administrators 🔑111(1)
Generally, executor or administrator who is lawyer, electing to act as his own attorney in performance of legal services incident to administration of estate, is not entitled to allowance against estate for his professional services in absence of statute (Probate Code, §§ 467, 901, 904, 910, 911).

2. Trusts 🔑231(1)
Trustee cannot place himself in situation wherein his interests conflict with his duty as fiduciary.

3. Executors and administrators 🔑111(1)
Attorney employed by his coadministrator to act as its attorney until executors should be appointed, *held* entitled to fees for legal services incident to administration of estate, where none of legal services were rendered for himself as administrator, as against contention that since attorney was one of administrators, he could not receive compensation for legal services regardless of manner of employment (Probate Code, §§ 467, 901, 904, 910, 911).

4. Executors and administrators 🔑97
Attorney chosen by personal representative to handle legal affairs of estate has such representative and not estate as his client.

5. Executors and administrators 🔑501
Trial court has discretion to make partial allowance of commissions and fees prior to final accounting of estate (Probate Code, §§ 467, 901, 904, 910, 911).

6. Executors and administrators 🔑501
Allowance in full of commissions and attorney's fees incident to administration of estate cannot be made until final accounting showing actual amount of estate, since total amount of allowable fees is limited to percentage of amount of estate as disclosed by such final accounting (Probate Code, §§ 467, 901, 904, 910, 911).

Appeal from Superior Court, Los Angeles County; May D. Lahey, Judge.

Proceeding in the matter of the Estate of J. B. Lankershim, sometimes known as James Boone Lankershim, deceased, wherein Doria C. Lankershim and John I. Lankershim filed objections to the allowance of special administrator's and attorney's fees. From an order fixing such fees, the objectors appeal.

Reversed in part, and affirmed.

Loeb, Walker & Loeb and Edward M. Auslender, all of Los Angeles, for appellants.

Hanna & Morton and W. W. Wallace, all of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Appeal from the order of the trial court fixing the special administrator's and attorney's fees.

The deceased, Colonel J. B. Lankershim, died in New York on October 16, 1931. Mr. J. Wiseman Macdonald, who for a number of years had been the attorney for the deceased, had in his possession a will which he had prepared for Colonel Lankershim in 1929, by the terms of which practically the entire estate was left to Doria C. Lankershim and John I. Lankershim, children of the testator and the objectors and appellants herein. Mr. Macdonald cabled the beneficiaries, who were in France, and, in accordance with the authority cabled back, presented the will for probate in the names of the son and daughter and himself, these three being the executors named in the will. A few days later Mr. Macdonald was first informed of and received from a personal attendant of Colonel Lankershim a document purporting to be a will executed by the latter two weeks before his death, by the terms of which each of the children were to re-

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*For subsequent opinion see 58 P.2d 1282.

ceive three-tenths of the estate, one-tenth was left to Mr. Macdonald and the remainder to other beneficiaries, and in which Mr. Macdonald and Bank of America were named as executors. Mr. Macdonald then filed a petition asking that this will be admitted to probate, also signing, as in the petition for probate of the prior will, as attorney for the petitioners. The probate of the later will, that of 1931, was abandoned after a contest had been filed, and, in this connection, it appears that Mr. Macdonald executed to the contestants, the children and beneficiaries under the first will, a transfer of any rights he might have under the 1931 will. Prior to the filing of the will of 1931 for probate, the Bank of America advised Mr. Macdonald that it desired him to represent the bank as its attorney in the probate proceedings, and this Mr. Macdonald agreed to do. In view of the contest and to preserve the estate and to do those things necessary until executors should be appointed, Mr. Macdonald and the Bank of America were appointed as special administrators. The bank employed Mr. Macdonald to act as its attorney throughout the administration of the estate, and he so acted until December, 1932, when executors were appointed. It was agreed between the bank and Mr. Macdonald that the latter would waive all right to administrator's fees, and that the bank would do practically all of the work of administration, and that Mr. Macdonald should receive only the fees of an attorney for the estate.

In February, 1932, the powers of the special administrators were made general and so continued during their administration. The agreement of Mr. Macdonald in relation to the matter of fees was declared by him in open court at the hearing of the petition for special letters of administration and in the presence of counsel for appellants and was promptly communicated to Doria Lankershim and John Lankershim, appellants herein, and to their attorneys. No objection appears to have been made by the court or any person until the proceeding which gives rise to this appeal and after the services upon which the claims for fees were made had been rendered, and the record warrants the conclusion that appellants first made objection in the matter of the fees of the special administrator and the attorney fees claimed by Mr. Macdonald at the time the matter of fixing such fees was presented to the trial court. Prior to the filing of the accounts of the special administrators, Mr. Macdonald had performed all legal services required by the estate.

Upon the filing of the final account of the special administrators and petition for allowance of fees, the trial court found and fixed the amount of the administrative fees to be allowed the Bank of America in the sum of $49,387.75 and the amount of attorney's fees to be allowed Mr. Macdonald in the sum of $56,443.15 minus the sum of $10,000 which had been paid him on account of such fees prior to the filing of the accounts. It appears that Mr. Macdonald also performed special legal services in the contesting of a claim filed against the estate by one Irene Herbert in the sum of $500,000 for which special services the trial court, basing its findings upon substantial proof in the record, fixed and allowed as reasonable compensation the further sum of $15,000.

The basic contention of appellant is that Mr. Macdonald, by reason of the fact that he was one of the special administrators, could not, as a matter of law, receive any compensation for legal services regardless of whether his employment was by both special administrators or solely the employment of his coadministrator, the Bank of America. It may be noted here that it is not contended that an administrator or executor may not perform legal services in estate matters, but merely that, if he does so, he is entitled to no compensation therefor.

Section 910 of the Probate Code provides that "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services." Sections 901 and 902 of the same Code provide for the commissions of executors for regular and extraordinary services, limiting the latter to what the court may deem just and reasonable and basing the regular compensation upon the amount of the estate accounted for. Section 467, by reference, makes the foregoing sections applicable to cases where the estate is handled by special administrators. There is nothing in our statutes bearing upon the question as to the right of an individual to act as both administrator or executor and as attorney, nor is there any specific provision of law in this state laying down the rule as to fees and commissions in such cases.

[1, 2] Appellants rely largely upon the case of In re Estate of Parker, 200 Cal. 132, 251 P. 907, 909. There, one Leon M. Abbott, a member of a firm of lawyers practicing in Massachusetts, was appointed the sole executor of the estate and employed this firm of lawyers and two members of the California bar to perform all legal services for the estate. In his final account, the executor claimed credit for all statutory commissions and extra compensation to which he possibly could be entitled as executor and also claimed credit for all of the statutory fees to which his attorneys could be entitled and an additional sum for extraordinary legal services. These items were allowed by the court. An appeal was taken by the residuary legatees from only that portion of the order allowing the sum of $40,000 as extra compensation to the executor's law firm and local counsel for extraordinary legal services. The court, in its opinion, says that if an executor or administrator "being himself a practicing lawyer, elects to act as his own attorney in the performance of the legal services incident to the administration of the estate, the general rule is that he will not be entitled to an allowance against the estate for his professional services, in the absence of some statutory provision entitling him thereto." This statement of the general rule is said by the court to be supported by the weight of authority and "though there is considerable apparent and perhaps real conflict of authority upon the subject * * * we deem it a sound and wholesome doctrine, founded upon reasons of public policy." The court decides the case before it upon the obvious premise that payment of legal fees to the law firm of which the executor was a member, was a payment of legal fees to the executor. The Parker Case is distinguishable from the case at bar in that there the court was considering a case in which there was but one executor who had the sole power to appoint legal counsel, who, in effect, appointed himself as legal counsel and claimed both the executor's fees and the attorney's fees for regular and extraordinary services. Only the extraordinary legal fees were considered by the Supreme Court, no appeal having been taken from the order of the trial court allowing the fees for regular legal services in addition to the executor's fees. The court states as the fundamental basis for the rule, supra, the principle that a trustee cannot place himself in a situation where his interests conflict with his duty as a fiduciary. Such a conflict, patent when a sole executor or administrator appoints himself as the attorney to handle the legal business of the estate, does not exist when the appointment, as here, is made by a coadministrator and the "clash between his own personal interest and his duty to employ the ablest counsel obtainable for the agreed compensation" and to oppose excessive charges, does not exist. It might also be mentioned that the court in the Parker Case, supra, 200 Cal. 132, page 140, 251 P. 907, finds ample support for its reversal of the order appealed from in the fact that to allow the fee for special legal services would be a double payment since, by the order of the trial court, the executor was also allowed compensation for extraordinary, executorial services in addition to his commissions for ordinary duties. The court further bases its reversal upon the ground (200 Cal. 132, page 142, 251 P. 907, 911) that many different items included in the description of services making up the amount of $40,000 "cannot be classified as extraordinary legal services," a conclusion quite obvious from the fact that part of the extraordinary legal services consisted in a study of the stock market in connection with the prospective sale of securities of the estate. The decision in the Parker Case is a typical application of the general rule to a state of facts demanding its application which cannot, however, be binding under a state of facts in which the reasons for that decision do not exist.

Considerable space has been devoted in appellant's brief to a discussion of the question as to whether Mr. Macdonald was the attorney for the estate, for both special administrators or for the administrators and the estate, a discussion based upon a variance in the description of the relationship in various portions of the record. It appears quite clearly, however, that, at the very outset, the Bank of America employed Mr. Macdonald, and that he continued throughout as the legal counsel for that administrator in its handling of all affairs of the estate. Under this view Mr. Macdonald, as to such services, was not the legal advisor appointed by himself as administrator. Had the bank been the sole administrator, either as the result of Mr. Macdonald declining to act by or withdrawing as coadministrator, there would have been no argument of appellant that he could not receive counsel fees—and it does not seem to us that his merely qualifying as coadministrator brings the facts within the rule announced in the Parker Case. The Parker Case and the cases to the same effect in other jurisdictions are opposed, on the grounds of public policy, to an administrator employing himself as legal counsel in estate matters thus giving himself the opportunity of pecuniary profit beyond that which would come to him as the representative of the estate, but in the case at bar the employment of Mr. Macdonald came not from himself but from the Bank of America; he claimed only fees for legal services and the element of self-employment, held by the cases to be contrary to public policy, does not exist in the case at bar.

[3, 4] Mr. Macdonald was designated by and acted as attorney for the administrator bank, in which capacity he was entitled to compensation for his services. There is no suggestion that Mr. Macdonald rendered any legal services as attorney for himself in the capacity of administrator beyond the services rendered as attorney for the bank. Any theory that Mr. Macdonald was the attorney for the estate would seem to be eliminated by the case of In re Estate of Ogier, 101 Cal. 381, 35 P. 900, 40 Am. St. Rep. 61, and In re Estate of Kruger, 143 Cal. 141, 145, 76 P. 891, which point out that an attorney chosen by a personal representative to handle like legal affairs of the estate of a decedent has as his client the representative who employed him and not the estate.

Inasmuch as Mr. Macdonald performed services of a special nature in connection with the Herbert litigation upon the agreement of appellants, and they having waived objections to his receipt for legal fees therefor, the objection to the claim for extraordinary legal services simmers down to a question of the amount to be allowed. We cannot say that the order of the court in this question of fact is not supported by the proof.

[5, 6] The matter of the regular special administrator's and attorney's fees is, however, governed by other and special provisions of law. Probate Code, §§ 467, 910, 901. Such fees are limited and determined by the "amount of estate accounted for" by the administrator. Section 901. While an allowance on account upon commissions or attorney fees may be made at any time after six months from the issuance of letters testamentary (sections 904, 911) no allowance in full of such commissions or fees can be made until the final settlement of the estate because, since the total amount of allowable fees is limited to a percentage of "the amount of estate accounted for" (section 901), which phrase obviously means the amount of the estate as disclosed by the final accounting, the total fees cannot be computed until the amount of the estate is so disclosed. Had a partial allowance of commissions and fees been desired, application could have been made and the court could have made such allowance by the exercise of the discretion in it vested by sections 904 and 911 of the Probate Code, but the court was premature and therefore erred in allowing the full amount of fees and commissions prior to a final accounting showing the actual amount of the estate. In re Estate of Piercy, 168 Cal. 750, 754, 145 P. 88; In re Estate of Aldersley, 174 Cal. 366, 375, 163 P. 206.

The order appealed from is reversed except as to that portion thereof allowing attorney's fees for extraordinary services in connection with the Herbert claim, and, as to the allowance for such special services, the order is affirmed.

In concur in the judgment: WOOD, J.

CRAIL, Justice (concurring).

I concur. But I wish to make additional comments. The sole trouble with the order of the trial court is that it provides for the payment in full of the attorney's fees for the respondent prior to the final settlement of the estate. An allowance on fees would have been proper, but not a payment in full. Section 911 of the Probate Code provides merely for "an allowance upon his fees." Section 910 of said Code provides that attorneys shall be allowed the same amounts as are allowed by the previous article to administrators. This takes us to sections 901 and 904 of the Probate Code. Section 904 provides for an allowance of commissions and fees prior to the final settlement of the estate, but this section provides for an allowance only, and directs that "the court shall make an order allowing him such portion of his commissions, for services rendered up to that time, as the court shall deem proper." But a careful reading of the section makes it clear that it provides merely for a portion and not for payment in full. We must go to section 901 for the proper rule where an order is sought for payment in full. That section provides "if there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each." The services of the last attorney in a succession of attorneys are never "actually rendered" until the final accounting, and it is clear that there can be no apportionment according to the services actually rendered by each until that time. Neither is it fair to an estate to make an order for fees in full prior to the settlement of the final account.

It should be made clear also that the decision of this court in no way bars the rights of respondent Macdonald to petition forthwith for a partial allowance of fees on account and further at the final accounting to receive such fees as the court may apportion to him according to the services actually rendered by each of the attorneys, less such fees as he has already received on account thereof.

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9 Cal.App.2d 199

NORTON v. LYON VAN & STORAGE CO. et al.

Civ. 10076.

District Court of Appeal, Second District, Division 2, California.

Sept. 16, 1935.

Hearing Denied by Supreme Court Nov. 14, 1935.

1. Principal and agent 🔑119(1)

Where clerk of warehouse informed bailor, whose goods had been sold for storage but were still in warehouse, that he could not make adjustment without authority from another office, alleged agreement for adjustment, in absence of proof that employee had authority in matter, was not binding on warehouse.

2. Tender 🔑12(2)

Alleged tender to warehouse by bailor of amount which was not shown to be amount owed, but appeared to be less than that amount, *held* not to extinguish obligation, since offer of partial performance is of no effect (Civ. Code, § 1486).

3. Tender 🔑13(1)

To extinguish obligation for payment of money, there must not only be offer of payment, but actual payment, or deposit of amount in bank and notice thereof to creditor (Civ. Code, § 1500).

4. Warehousemen 🔑34(4)

In action by bailor for wrongful sale of goods by warehouse, claim of damage for illness and impairment of health suffered when bailor learned of sale *held* demurrable, since illness was neither natural result of sale, nor capable of being reasonably anticipated by warehouse.

5. Warehousemen 🔑33

Warehouse which sent by registered mail copy of notice of sale of bailor's property to his last known residence complied with statute regarding notice of sale, receipt of notice by bailor being unnecessary (Gen. Laws 1931, Act 9059, § 33).

6. Warehousemen 🔑2

Provisions of Warehouse Receipt Act which allowed sale by warehouse of bailor's property for storage after certain time, and after notice by registered mail sent to bailor's last known place of residence, *held* constitutional (Gen. Laws 1931, Act 9059, § 33).

7. Warehousemen 🔑34(2)

Bailor who failed to pay charge provided for in original storage agreement, and thus failed to show right to possession of goods, could not maintain action based on alleged unauthorized and void sale of his goods by warehouse.

8. Judges 🔑49(1)

In action by bailor for unauthorized sale of his goods by warehouse, contention that trial judge, who had been member of Legislature which enacted Warehouse Receipt Act, was biased and prejudiced against bailor, *held* unsustainable, where record clearly showed judge presided with fairness and ability.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by M. G. Norton against the Lyon Van & Storage Company and others. From a judgment for the defendants, the plaintiff appeals.

Judgment affirmed.

M. G. Norton, of Los Angeles, in pro. per.

Williamson & Musick, Gwyn S. Redwine, and Frank H. Ferguson, all of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Appeal by plaintiff from a judgment following the granting of defendants' motion for a nonsuit.

For simplicity the respondent companies, one being the successor of the other, will be referred to herein merely as the "storage company." Appellant stored certain furniture and other personal property with the storage company on about June 2, 1930, under an agreement whereby appellant, in addition to a handling charge of $4 and a cartage charge of $5, agreed to pay a storage rate of $4 per month. Shortly thereafter a warehouse receipt was sent by mail to appellant, whose address was then 2316 West Tenth street, Los Angeles. Nothing was paid by appellant to respondents for a period of nearly eighteen months, and no attention was paid by him to the bills sent him during this period. On November 14, 1931, the storage company notified appellant that unless payments were made his goods would be sold, and thereupon appellant on December 9, 1931, made a payment of $200 on the account. No further payments being made, the storage company on May 2, 9, and 16, 1932, published a notice of sale of the property for unpaid storage in the Los Angeles Daily Journal, and sent a copy of this notice by registered mail to appellant at 2316 West Tenth street, Los Angeles; that being the last address of appellant known to respondent. The notice was returned by the post office with the notation: "Moved. Left no address." On May 26, 1932, the goods were sold by the storage company for $95.31, the amount of the unpaid storage charges, to respondent Burns, an employee of the storage company, but were not removed from the warehouse and have remained there at least up to the taking of this appeal. On July 5, 1932, appellant wrote the storage company requesting a statement of his account, and two days later received a reply advising him that his goods had been sold to pay an unsatisfied storage bill of $95.31. Thereafter appellant went to the warehouse in person. He was informed that he could secure a return of his goods if he would pay the storage charges and costs and expenses of sale. Appellant secured a check for $96, signed by his sister and payable to his order, and went to a branch office of the storage company; but when informed by Mr. Burns, the company's representative, that the matter could not be adjusted without authority from the Hollywood office, appellant picked the check up from the counter where he had previously laid it and left taking the check with him.

[1] Appellant claims an accord and satisfaction of the item of $95.31 as the result of a subsequent conversation with Mr. Burns. As it appears from the declaration of Burns to appellant that he could not make any adjustment without the authority of the Hollywood office of the storage company and as there is a total absence of proof that Burns had authority in the matter, the transaction with Burns, assuming but not conceding that it would amount in law to an accord and satisfaction, was not binding upon the company.

[2, 3] Appellant also claims that his alleged tender of the $96 check extinguished the obligation then due. There is no showing that, at the time of the alleged tender, the amount due was $96 and not some other sum. Since it appears that the amount due on May 26, 1932, was $95.31 and the storage rate agreed upon was $4 a month, and the alleged tender was made on July 18, 1932, it seems evident that $96 was less than the amount due and, as concerns the subject of extinguishment of an obligation, "an offer of partial performance is of no effect." Civ. Code, § 1486. Furthermore, to extinguish an obligation for the payment of money there must not only be an offer of payment but also actual payment or the deposit of the amount in a bank and notice thereof to the creditor. Civ. Code, § 1500.

Subsequently appellant made payments of $25, $15, and $10, but no further payments were ever made. On March 30, 1933, appellant brought this action for the possession of the property and various items of alleged damage.

[4] Appellant claims error because of the sustaining of a demurrer without leave to amend as to the second cause of action in his third amended complaint wherein he claims damages under the claim that, upon learning of the sale of his goods, he suffered various illnesses and impairments of health. Appellant cites no authority nor are we apprised of any authority for the recovery of damages which are neither the natural result of the sale of his property nor capable of being reasonably anticipated by the defendants.

Under the Warehouse Receipts Act (Act 9059, Gen. Laws 1931), the storage company had a lien for storage charges. These charges not being paid, the warehouseman, having given notice of the contemplated sale of the property, as required by section 33 of that law, lawfully sold the stored property. The company then offered to surrender its title if appellant would pay the past-due charges and expenses of sale. Had this offer not been accepted, the absence of title in appellant would have been a complete defense to the action. Conceding that appellant did accept the offer, it is obvious that he did not comply with its terms but has both failed and refused to pay any of the storage charges incurred prior to the date of sale or all of the storage charges subsequent thereto, as noted above, and his claimed right to possession, in view of his complete failure to repurchase the property, had no existence.

[5] Appellant's argument that no legal notice of the sale was sent him is answered by section 33 of the act, which states that, "Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified." Actual receipt of the notice is not required. The Legislature quite evidently was aware of the fact that owners of stored property frequently change their places of business and abode and cannot personally be served, and hence provided for service by registered mail in such cases. Appellant's agreement for storage was made in the light of the statute, and he cannot well complain of the nondelivery of the notice because he failed to advise the storage company when he changed his address.

[6] Appellant, though in some respects apparently relying upon provisions of the Warehouse Receipt Act, also contends that it is unconstitutional. No satisfactory argument favoring this contention is advanced, and we can see no reason for not sustaining the constitutionality of the act so far as the provisions affecting this action are concerned. Even in the absence of the Warehouse Receipt Act, a depositary for hire has a lien for storage charges and expenses of sale (Civ. Code, §§ 1856, 3051), and in the event of nonpayment may sell the property deposited. Civ. Code, § 3052.

[7] Under one of appellant's theories, it is suggested that the sale was unauthorized and void. Even if tenable this would not avail appellant, since under this theory he obviously shows no right to possession of the property by reason of his failure to pay the charges provided for in the original storage agreement.

[8] Appellant's claim of bias and prejudice of the trial judge because he had been a member of the Legislature which enacted the Warehouse Receipts Act is without merit, and the record warrants only the conclusion that the trial judge presided with fairness, ability, and patience.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 278

FRANCIS et ux. v. PACIFIC ELECTRIC RY. CO.

Civ. 10448.

District Court of Appeal, Second District, Division 2, California.

Sept. 25, 1935.

Hearing Denied by Supreme Court Nov. 22, 1935.

1. New trial 🔑71

Where evidence is conflicting, it is within discretion of trial court to grant new trial.

2. New trial 🔑68

Court, in granting motion for new trial, may draw inferences from evidence opposed to those drawn by jury, provided such inferences are reasonable, since conflicting inferences, if reasonable, stand upon same plane as conflicting evidence.

3. Appeal and error 🔑1015(1)

Order granting defendant new trial on ground of insufficiency of evidence in action for death of driver of automobile in collision with defendant's interurban car could not be reversed where record did not justify conclusion that defendant was guilty of negligence as matter of law, and that deceased was free from contributory negligence as matter of law.

◆

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Frank W. Francis and wife against the Pacific Electric Railway Company. From an order granting defendant's motion for a new trial, plaintiffs appeal.

Affirmed.

Emmett A. Tompkins, of Los Angeles, for appellants.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent.

WOOD, Justice.

Douglas C. Francis, nineteen years of age, was killed when the automobile which he was driving collided with an interurban car of defendant company. His parents commenced this action for damages and the jury returned a verdict in their favor. The trial court granted a motion for new trial "on the grounds of insufficiency of the evidence to support the verdict," and from the order granting the motion plaintiffs prosecute this appeal.

The accident occurred at about 4:30 o'clock in the afternoon at the intersection of St. Joseph street and Second avenue in the city of Arcadia. Defendant's car approached the intersection from the east on the company's private right of way. The deceased was driving his automobile north on Second avenue. The intersection of the two streets is entirely paved; Second avenue is paved north and south of the intersection and St. Joseph street is paved west from the intersection. Photographs introduced in evidence indicate that the neighborhood is sparsely settled. Trees, a pile of pipe, and a water tank obscure the view to the right of a driver of an automobile as he approaches the intersection on Second avenue from the south. His view, however, becomes clear at a point about fifty feet from the intersection.

[1-3] A conflict of evidence on several points is disclosed by the record. There was evidence that the interurban car and the automobile approached the intersection at approximately the same speed and that the driver of the automobile did not lower his speed before the collision. No useful purpose would be served by a statement of the evidence in detail. It is sufficient to point out that the new trial was granted on the ground of insufficiency of the evidence to support the verdict and to refer to the oft-repeated rule that in cases where the evidence is conflicting it is within the discretion of the trial court to grant a new trial. In re Estate of Everts, 163 Cal. 449, 125 P. 1058; Allen v. Bay Cities Transit Co., 122 Cal. App. 590, 10 P.(2d) 520. The judge, in granting the motion for a new trial, could draw inferences from the evidence opposed to those drawn by the jury, provided the inferences drawn by him were reasonable. "Conflicting inferences, if reasonable, stand upon the same plane as conflicting evidence." Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., 176 Cal. 451, 168 P. 1033, 1035. To justify a reversal of the order of the trial court, we must conclude that the evidence herein establishes that the defendant was guilty of negligence as a matter of law, and that the deceased was free from contributory negligence as a matter of law. In re Estate of Sexton, 199 Cal. 759, 251 P. 778. The record before us does not justify such a conclusion.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

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9 Cal.App.2d 312

PEOPLE ex rel. STEPHENSON v. HAYDEN.

Civ. 9833.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1935.

Quo warranto 🔑49

Complaint in proceeding in nature of quo warranto to determine right of defendant to hold office of supervisor of city and county, stating that defendant was usurping, intruding into, and unlawfully holding and exercising office of supervisor, *held* to state cause of action, since in proceeding of such character prosecuted by state to plead in general terms ultimate fact of usurpation is sufficient.

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Proceeding in the nature of quo warranto by the People of the State of California, on the relation of Jesse H. Stephenson, against J. Emmet Hayden. Judgment for defendant, and plaintiff appeals.

Reversed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and William E. Kidd, of San Francisco, for appellant.

Walter H. Duane, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant was a member of the board of supervisors of the city and county of San Francisco, from which position he was retired on January 8, 1934. On February 16, 1934, the mayor of the city and county of San Francisco appointed defendant to fill a vacancy on said board, which position he now holds. Relator made application to sue in the nature of quo warranto in the name of the people to determine defendant's right to hold said office. The trial court sustained a demurrer without leave to amend as to the first count of the complaint and with leave as to the second count. A demurrer to the amended complaint was sustained with leave to amend, but plaintiff declined to amend, and judgment went to the defendant. The plaintiff appeals from the judgment.

The original complaint pleaded grounds upon which the pleader claimed that the defendant was unlawfully usurping the office. When the demurrer was sustained to this complaint, these were all abandoned, and the amended complaint pleaded in general terms that defendant was "usurping, intruding into, and unlawfully holding and exercising the office of Supervisor. * * *" The rule seems to be well settled that, in a proceeding of this character prosecuted by the state, it is sufficient to plead in general terms the ultimate fact of usurpation. People v. Dashaway Association, 84 Cal. 114, 118, 24 P. 277, 12 L. R. A. 117; People v. Reclamation Dist. No. 136, 121 Cal. 522, 523, 50 P. 1068, 53 P. 1085; People v. Los Angeles, 133 Cal. 338, 341, 65 P. 749. The theory upon which the rule rests is that in quo warranto the state is not required to prove the usurpation or unlawful holding, but the entire proceeding is one in the nature of an order upon the defendant to show that he is lawfully holding and exercising the office. Though the rule of pleading has been often criticized, it has not been rejected by our Supreme Court, and it is therefore binding upon us.

The instant case furnishes basis for further criticism of the rule. In the original complaint the specific grounds were alleged upon which the relator claimed that defendant was unalwfully occupying the office. The trial court found these grounds insufficient and sustained a demurrer to the complaint. The relator amended by omitting these grounds and pleading his legal conclusions. If the relator has no further grounds than those heretofore asserted, the continuation of the litigation would be frivolous, and an abuse of the process of the remedy which is designed for the protection of the people against the unlawful usurpation of office or franchise. But on this appeal we are limited to the single question whether the amended complaint states a cause of action. Under the rule of the cases cited, we must answer that question in the affirmative.

The judgment is therefore reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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9 Cal.App.2d 230

TIMM v. McCARTNEY et al.

Civ. 10094.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1935.

1. Courts 🔑481

Trial court *held* not precluded from sustaining objection to taking of testimony upon ground that amended complaint did not state facts sufficient to constitute cause of action, even though same court by another judge in law and motion department had overruled general demurrer to complaint.

2. Judgment 🔑43(2)

Complaint by purchaser of lots alleging that vendor had conveyed such lots to third party during pendency of appeal of action in which vendor had sought to quiet title, but in which judgment was entered directing vendor to convey lots to purchaser and directing clerk of court to convey lots if vendor failed to do so, and alleging damage from failure to make conveyance to purchaser *held* to state cause of action, since action was based on new set of facts not existing at time of former judgment (Code Civ. Proc. § 674).

3. **Pleading** ⚿205(2)

Second count of complaint by purchaser of lots asking judgment for reasonable rental value of lots alleged to have been wrongfully withheld, where return of purchase price with interest had been demanded in first count, *held* to state cause of action good against general demurrer without leave to amend, although purchaser would not be entitled to both return of purchase price and rental value, and although second count might be subject to special demurrer.

4. **Pleading** ⚿205(2)

Third count of complaint by purchaser of premises seeking to recover sums alleged to have been actually paid by purchaser to obtain title to such premises from third party to whom they had been wrongfully conveyed by vendor, although possibly subject to special demurrer, *held* to state cause of action good against general demurrer without leave to amend.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Emma R. Timm against Alice G. McCartney and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Prior opinion 46 P.(2d) 230.

Tanner, Odell & Taft, of Los Angeles, for appellant.

C. E. McDowell, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The plaintiff appeals from a judgment awarded defendant after the court had sustained an objection to the taking of any testimony upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action. After sustaining the objection to the introduction of evidence, the court forthwith granted judgment on the pleadings.

[1] Under the circumstances, the ruling of the court amounted in effect to the sustaining of a general demurrer without leave to amend, and it is appellant's first contention that it was error for the court to sustain such objection, since the same court by another judge in the law and motion department had overruled a general demurrer to the complaint. We do not sustain this contention. It is a somewhat common occurrence for a trial court to change its rulings upon questions of law during the progress of a trial, and a ruling on demurrer occupies no better position in this regard than any other ruling from which an appeal cannot be taken. De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717. The inconvenience caused the plaintiff is an occasional by-product of the system which exists in Los Angeles county of settling the pleadings in one department and of trying the issues in another. While there is some difference of opinion as to the advantages of this specialization of departments, it is safe to say that most lawyers and most judges of said court, of which there are fifty, believe it is more efficient than the practice of each judge settling the pleadings of cases assigned to his department. Occasionally the law and motion department judge differs with the trial department judge, but this must be endured, as it would be quite impracticable to require the trial judge to proceed to the trial of a case in which the complaint does not state facts sufficient to entitle the plaintiff to any relief. Nevertheless, the trial judge should keep in mind that the judge who presides over the law and motion department soon becomes an expert in matters of pleading, and the trial judge should make such a reverse ruling with great caution. Certainly it would be better practice when such a drastic and unexpected order is made, for the trial judge to volunteer to the plaintiff a reasonable continuance of the case with permission to amend the complaint, to the end that where possible cases be tried upon the merits.

[2] Appellant next contends that each of the three counts of her complaint does state a cause of action, and we shall now examine the complaint in the light of this contention. It is alleged that defendant Alice G. McCartney began an action in the superior court of said county entitled McCartney v. McCalla et al., No. 129142, to quiet title to certain lands, among which were the two lots which had been purchased by the plaintiff from the defendant; that the plaintiff was made a party defendant in that action; that as a defense to said action plaintiff alleged that she had paid to said McCartney the full purchase price for said lots, for which the said McCartney had agreed to convey to her said lands; that at said time the said McCartney held legal title in fee to said lands; that thereafter judgment was entered in favor of the plaintiff herein and a copy of the said judgment is attached

to and made a part of the complaint; that thereafter and on May 17, 1928, the said McCartney appealed from said judgment to the Supreme Court and that the judgment of the superior court was affirmed on November 30, 1932; that thereafter the plaintiff demanded of the defendant that she execute and deliver to her a deed to said lots, but that the defendant has failed, neglected, and refused so to do.

It appears from the said judgment, which was made a part of the complaint, that the said McCartney was entitled to take nothing as against the defendants or either of them, including the plaintiff herein, except that upon payment by or on behalf of said McCalla (the general sales agent of said McCartney) to the clerk of the above-entitled court for the account of said McCartney of the sum of $7,000 plus, which sum is hereinafter referred to as the "purchase price," within a period of 30 days from and after the date upon which the judgment shall be final, the said McCartney do execute and deliver to the said McCalla a good and sufficient deed to several of the lots, and that upon the payment to said clerk of said "purchase price," that the said McCartney do execute and deliver to the said Timm (plaintiff herein) a good and sufficient grant deed to her two lots, and, further, that in the event the said Timm or others pay to the clerk of the court on behalf of the said McCalla the said purchase price the said McCartney fails or refuses to execute such deeds, it is ordered and decreed that the clerk of the court is appointed a commissioner and directed to execute and deliver to each of the defendants said deeds, and that such deeds shall operate as a transfer to each of said defendants of all of the right, title, and interest of the said McCartney in and to the property described in such deed or deeds.

Plaintiff further alleged on information and belief that on or about February 15, 1929 (during the pendency of said appeal), the said defendant McCalla or his assigns paid to or adjusted with the said McCartney (not to the clerk of the court as designated in the judgment) the said sum of money designated in said judgment as the "purchase price," and that thereupon Mr. C. E. McDowell received from the said McCartney a deed of conveyance by which the said McCartney conveyed to the said McDowell (not to the plaintiff as designated in the judgment) the premises purchased by the plaintiff as aforesaid, and for such reason the said McCartney then and there placed it out of her power to convey such property to the plaintiff; that by reason of the foregoing facts and of the said demand made by the plaintiff on the defendant on or about November 30, 1932, plaintiff has been damaged in the amount of the original purchase price of the lots with interest, no part of which has been paid.

The contention of the defendant in her reply brief is that the first count of the plaintiff's complaint fails to state a cause of action because all matters therein have been previously litigated, and also because the plaintiff could have obtained her deed in the original action by applying to the clerk of the court as a commissioner. It will be observed, however, assuming the facts to be true as alleged, that while the previous action was pending on appeal and before the judgment became final, indeed before the judgment became a lien on the property involved (see section 674, Code Civ. Proc.), the defendant McCartney placed it out of her power and therefore out of the clerk's power to successfully convey said property. Her successor in interest to the lots, the said McDowell, was not a party to the lawsuit, at least so far as appears upon the face of the complaint. The clerk of the court could not execute a deed which would be good as against him unless and until he was made a party to the action or a judgment in an independent action had been obtained against him. It is apparent that the cause of action upon which the plaintiff was suing arose subsequent to the entry of the judgment in the preceding action. The action as alleged is based on a new set of facts not existing at the time of the former judgment. Silva v. Reclamation District No. 1001, 41 Cal. App. 326, 182 P. 786, and cases cited.

In her reply brief the defendant relies upon certain language used in McCartney v. Campbell et al., 208 Cal. 647, 284 P. 220. That proceeding was upon a motion of the plaintiff herein to dismiss the appeal in the prior action upon the ground that the defendant herein by deed had conveyed said property to said McDowell. The court said: "We can discern no merit whatever in the motion. There is no privity between respondent McCalla and respondent Timm. Their rights are in no sense interdependent. The adjustment did not include respondent Timm. The cause of action against her remains as before." Certainly the appellant in that action still had the right to present her appeal, the right to contend that the trial court had made errors of law which entitled her to a reversal, and if possible to defeat the judgment against her, and the motion to dismiss was without merit. But it is not precisely true, as claimed by the defendant, that in that proceeding "the Supreme Court * * * held that the transfer of Mrs. McCartney of her interest in the lots claimed by Mrs. Timm did not affect the litigation in any way whatsoever." Such a statement, if it had been made by the court, would have been wholly beyond the question presented by the motion for a dismissal and unnecessary to its decision.

The defendant also relies upon a statement in the case of McCartney v. Campbell, 216 Cal. 715, 16 P.(2d) 729, 730, that "It also appears that plaintiff [McCartney] has compromised certain claims, and that her interest in the litigation has succeeded to C. E. McDowell." It is a sufficient answer to say that this fact, if true, does not appear upon the face of the complaint. The statement, as quoted, was wholly unnecessary in the decision of the appeal. Furthermore, it would not necessarily be true that since McDowell had succeeded to the "interests" of McCartney he had also assumed her obligations and liabilities, or that she could free herself from such obligations without the consent of the plaintiff.

Certain defenses are set up by the defendant in an answer and there may be other defenses when the pleadings are finally formed and the issues joined; indeed, there may be several meritorious defenses to the plaintiff's cause of action, but we are discussing a ruling of the court which amounts to the sustaining of a general demurrer without leave to amend, and such defenses do not appear upon the face of the complaint. The first count of the complaint states a cause of action. For cases with somewhat similar reasoning see Jackins v. Bacon, 63 Cal. App. 463, 218 P. 1027; Cohen v. A. F. A. Realty Corporation, 250 N. Y. 262, 165 N. E. 285.

[3] The second count of the amended complaint is similar in all respects to the first except that instead of asking for the return of the purchase price with interest, it alleges the reasonable rental value of the premises so withheld from the plaintiff and asks judgment therefor. While the plaintiff manifestly would not be entitled to both the return of the purchase price and the rental value, and while this count may be subject to special demurrer, nevertheless it sufficiently states a cause of action to be good against a general demurrer without leave to amend.

[4] The third cause of action alleges facts similar to the first except that it seeks to recover the sums alleged to have been actually and necessarily paid to obtain from McDowell the title conveyed wrongfully to him by defendant. What we have said with regard to the second count has equal applicability to the third. McCormick v. Marcy, 165 Cal. 386, 132 P. 449; Standard Livestock Co. v. Pentz, 204 Cal. 618, 269 P. 645, 62 A. L. R. 1239.

Judgment reversed.

We concur: WOOD, J.; FRICKE, Justice pro tem.

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9 Cal.App.2d 257

TITLE GUARANTEE & TRUST CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 10353.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1935.

Prohibition 🔑5(1)

Where final judgment had been rendered in action upon basis of new trial granted upon an interlocutory decree and only ministerial acts remained to be performed in execution of judgment, prohibition *held* not to lie to prevent performance of such ministerial acts, regardless of whether court had authority to have granted new trial upon basis of an interlocutory decree only, since there was an adequate remedy by appeal from the final judgment.

Petition for writ of prohibition by the Title Guarantee & Trust Company against the Superior Court in and for Los Angeles County and another.

Alternative writ theretofore issued discharged.

W. W. Kaye and Alfred E. Cate, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, D. De Coster, Deputy Co. Counsel, and S. W. Newman, all of Los Angeles, for respondents.

HOUSER, Justice.

In this matter it appears that an alternative writ of prohibition was issued by order heretofore made by this court, and that, as far as are material to a conclusion as to whether such writ should be made permanent, the necessary facts as disclosed by the files are that in due course, in an action pending in the superior court, in which the petitioner herein was a party defendant, an interlocutory judgment only was rendered; that thereafter, pursuant to motion made and presented by another of the parties defendant in the action, a new trial was granted; that following a second trial (all over the objection of petitioner herein to the effect that, the premises considered, the court was then lacking in jurisdiction), a final judgment was rendered, by virtue of which no act of a judicial nature remains to be performed; and that by its petition herein petitioner seeks an order from this court by which the respondent court will be restrained and prohibited "from taking any further steps or proceedings in connection with, or based upon, the said judgment," etc.

Although it may be, as contended by petitioner, that an order made by the superior court by which a new trial was granted as to an interlocutory decree only, theretofore rendered by such court, was in excess of its authority, Gunder v. Gunder, 208 Cal. 559, 282 P. 794; Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938, and consequently that, as a matter of law, the final judgment which was rendered in pursuance to the second trial of the action should be adjudged to be of no validity (as to neither of which questions this court expresses an opinion), nevertheless, where final judgment has been rendered in an action and no judicial act remains to be performed under a direction or order therein specified or reserved, but only acts of a ministerial nature are possible of performance in the proper execution of such judgment, it is well-settled law that, there being an adequate remedy by appeal from such judgment, prohibition will not lie to prevent the performance of such or any contemplated or threatened ministerial acts. Clark v. Superior Court, 55 Cal. 199; Plocher v. Superior Court, 135 Cal. App. 337, 26 P.(2d) 841; Dunn v. Justice's Court, 136 Cal. App. 269, 28 P.(2d) 690; Valentine v. Police Court, 141 Cal. 615, 75 P. 336, and authorities therein respectively cited.

It is ordered that the writ heretofore issued herein be, and it is, discharged.

We concur: CONREY, P. J.; YORK, J.

9 Cal.App.2d 260

CALKINS v. GOSSARD.

Civ. 10333.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1935.

Appeal and error 🔑854(6)

On appeal from order granting new trial which did not specify it was made upon ground of insufficiency of evidence, appellate court could not consider whether evidence was sufficient to sustain verdict, where transcript revealed that evidence was not insufficient in law to sustain verdict and that it was not without conflict upon any material point (Code Civ. Proc. § 657).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Cecil M. Calkins against Dr. Earl J. Gossard. From an order granting a new trial, the defendant appeals.

Order reversed.

Harry D. Parker, Raymond G. Stanbury, White McGee, Jr., and Vernon W. Hunt, all of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff sued defendant for damages for personal injuries resulting from a collision between plaintiff's motorcycle and defendant's automobile. Trial by jury resulted in a verdict for defendant. Plaintiff's motion for new trial was granted by the trial court, and defendant presents this appeal from the order so entered.

Ten grounds, including four specifications of insufficiency of the evidence, were enumerated in the motion for new trial. In the order granting the motion, however, it is not specified that it is made upon the ground of insufficiency of the evidence, and it therefore will be presumed that the order was not based upon that ground. Code Civ. Proc. § 657.

Examination of the transcript on appeal reveals that the evidence is not insufficient in law to sustain the verdict and that it is not without conflict upon any material point. We are therefore precluded from considering whether or not the evidence is sufficient to sustain the verdict. Read v. Pacific Electric Ry. Co., 185 Cal. 520, 197 P. 791.

As to the other grounds stated in the motion for new trial, the record reveals nothing to support them. No affidavits were presented and no assignments of misconduct or irregularity were made, and the record is wholly silent and negative with respect thereto.

It follows that the order granting a new trial should be, and the same is hereby, reversed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 267

SPENCER v. CITY OF CALIPATRIA et al.

Civ. 1167.

District Court of Appeal, Fourth District, California.

Sept. 24, 1935.

Hearing Denied by Supreme Court Nov. 22, 1935.

1. **Municipal corporations 🔑812(8)**
Filing of unverified claim *held* not substantial compliance with statute requiring verified claim to be filed with legislative body of city before commencement of suit against city for injuries (Gen. Laws 1931, Acts 5149, 5150).

2. **Municipal corporations 🔑812(1)**
Statutes requiring verified claim for injuries to be filed with legislative body of city are mandatory and must be substantially complied with in order to lay foundation for action against city for such injuries (Gen. Laws 1931, Acts 5149, 5150).

3. **Municipal corporations 🔑811**
Right to bring action against city for defective condition of street or negligence of officers does not exist independent of statute, and Legislature may prescribe procedure and conditions under which right may be exercised when it is granted.

4. **Municipal corporations 🔑812(5)**
City was without authority to waive provisions of statutes requiring person who claims injuries as result of defective condition of sidewalk or through negligence of city officials to file verified claim with legislative body of municipality (Gen. Laws 1931, Acts 5149, 5150).

5. **Estoppel 🔑68(4)**
City which received unverified claim for injuries which were caused by defective sidewalk, submitted such claim to insurance carrier which made offer of compromise, and later rejected claim, *held* not estopped from raising defense of failure of claimant to file verified claim as required by statutes, where 19 days remained in which claimant could have filed verified claim after notice of rejection of claim by city (Gen. Laws 1931, Acts 5149, 5150).

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by E. H. Spencer against the City of Calipatria and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, and W. I. Wilson, of Brawley, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment entered after a demurrer to an amended complaint was sustained without leave to amend.

The action is one for damages on account of injuries alleged to have been suffered by the appellant on November 1, 1932, through a defective sidewalk within the respondent city. As conceded by the appellant, no verified claim was filed in accordance with the statutes adopted in 1931 (Stats. 1931, pp. 2475 and 2476; Deering's Gen. Laws 1931, Acts 5149 and 5150). The complaint does allege that a written claim was delivered to each of the defendants, to the city clerk and to the board of trustees of said city, "setting forth the facts concerning said injuries sustained by the plaintiff and how, when and where the same were sustained and the address and claim of the plaintiff and asking that he be compensated for his injuries and setting forth his demand."

[1-3] The first question raised is as to whether the provisions of the statutes referred to are mandatory. It has long been held that there must be at least a substantial compliance with statutes of this nature, making certain steps essential before a suit may be filed. Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028; Uttley v. City of Santa Ana, 136 Cal. App. 23, 28 P.(2d) 377. Not only is the filing of an unverified claim not a substantial compliance with a statute requiring that a verified claim be filed, but, in two recent cases, it has been held that the provisions of the two statutes here in question are mandatory and must be complied with in order to lay the foundation for an action. Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 P.(2d) 185; Myers v. Hopland Union Elementary School District of Mendocino County (Cal. App.) 44 P.(2d) 654. No right to bring such an action exists independent of statutory enactment and, in giving such a right, the Legislature may prescribe the procedure and conditions under which it may be exercised. That such a claim must be verified is a reasonable provision which should not be held to be ineffectual and meaningless.

[4, 5] The appellant further contends that the respondents were estopped from raising the defense of lack of compliance with these statutes because it was further alleged that the claim, as presented on November 3, 1932, was considered by the defendants and submitted to the insurance carrier for the respondent city that an offer of compromise was made by this insurance carrier, and that the appellant was not notified that the city had rejected the claim and refused to consider the same until January 12, 1933. Not only was the city without power to waive the provisions of these statutes (Chapman v. City of Fullerton, 90 Cal. App. 463, 265 P. 1035), but at least one of the essential grounds of an estoppel is lacking. After the appellant was notified that the city had rejected the claim and would not consider it further, as alleged in the complaint, nineteen days remained during which the claim could have been presented in the manner required by the statute.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

9 Cal.App.2d 246

PEOPLE v. GRIFFIN et al.

Cr. 2715.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1935.

1. Robbery 🔑24(1)

In prosecution for robbery and murder, evidence *held* sufficient to warrant inference that certain articles were taken from victim as alleged in information.

2. Criminal law 🔑1159(1)

Appellate court could not interfere where, upon sufficient evidence, jury decided against accused.

3. Criminal law 🔑673(4)

In prosecution for robbery and murder, defendant could not complain that court erred in admitting testimony as to manner of acquisition of guns in possession of defendants at time crime was perpetrated where questioned evidence was limited in effect to codefendant, and court instructed that evidence applicable to one defendant should be considered only as against that defendant.

4. Homicide 🔑285
Robbery 🔑27(6)

In prosecution for robbery and murder, instruction that mere possession of stolen property is circumstance to be considered with other testimony in determining question of guilt, and that if jury believed that property was stolen and in possession of defendants soon thereafter, failure of defendants to account for such possession would be circumstances tending to show guilt, unless his possession was explained, *held* proper where evidence was sufficient for jury to infer that defendant had possession of stolen property, but, finding it worthless, had thrown it away.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Rush Griffin and Willie Smith were convicted of robbery and murder, and Willie Smith appeals.

Judgment affirmed.

Curtis C. Taylor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, Justice.

Defendants were convicted of the robbery and murder of Laurence L. Lyon, as charged in an information. Defendant Smith appeals from the judgment of conviction and from the order denying his motion for a new trial.

It appears from the record that decedent was a medical student at the University of Southern California in the city of Los Angeles; that he spent the evening of November 11, 1934, with friends, and that around the hour of 1:20 a. m. these friends drove him in their automobile to his fraternity house, where he made his home, which was located near the university. About an hour later, in the neighborhood of Eighth street and Central Avenue, in the city of Los Angeles, decedent was shot by defendant Griffin, who robbed him, struck him in the head and left him lying in the street. He died shortly thereafter as result of the injuries received at the hands of Griffin.

As to defendant Smith's connection with the crime, the theory of the prosecution was that Smith was an accomplice of Griffin and that he acted as a lookout for Griffin, as he stood leaning against the corner of a building at a point near the intersection of Ninth street, Central avenue and Linden street, which commanded a view of the adjacent neighborhood. The two defendants lived together, were seen in each other's company earlier in the evening in a speakeasy, where they displayed the guns which were used to perpetrate the crime, and remained in each other's company subsequent to the crime, until arrested by police officers at their apartment.

There were several witnesses, who testified at the trial, who were attracted by an argument between Griffin and Lyon and the subsequent shooting, two of whom arose from their beds and looked out of windows just above the scene of the shooting and saw Griffin and decedent, but were not able to see appellant, who, according to the testimony of Dennis Wells, was standing at the corner of the building, above referred to, at the time of the shooting; that appellant shortly thereafter slid around the corner, and after defendant Griffin had turned decedent over and had robbed him and struck him in the head, appellant walked over and kicked decedent on the feet, left the scene of the crime and later joined defendant Griffin about a block away.

Appellant, upon this appeal, makes the following points: 1. That the information did not state the facts in clear and concise language as to the charge of robbery to notify defendant what to expect. 2. That the evidence was insufficient to justify the verdict of robbery or the verdict of murder. 3. That the court erred in the admission of evidence. 4. That there was prejudicial misconduct on the part of the district attorney. 5. That the court erred in giving a certain instruction.

The information charged that defendants "did wilfully, unlawfully, feloniously and forcibly take from the person and immediate presence of one Laurence L. Lyon, the following described personal property, to-wit: A bill-fold, of the value of One Dollar ($1.00), lawful money of the United States, and a watch, of the value of Two Dollars ($2.00), lawful money of the United States, in the possession of Laurence L. Lyon, which said taking was then and there without the consent and against the will of the said Laurence L. Lyon, and was then and there accomplished, as aforesaid, by the defendants by means of force used by said defendants upon and against the said Laurence L. Lyon, and by said defendants then and there putting the said Laurence L. Lyon in fear."

[1] Appellant claims that during the course of the entire trial no proof was offered, and that there is no evidence in the record concerning the articles enumerated in the information. The record shows that there was evidence to the effect that defendant Griffin went through the pockets of decedent as he lay inert upon the ground after the shooting, and in addition there was evidence that eleven cards, including an automobile registration card belonging to decedent, were found

underneath the window of the apartment where the defendants lived. While on the witness stand, defendant Griffin was asked about the billfold or wallet mentioned in the information, and which is also referred to as a card case or pocketbook, and he testified that he saw something of that kind when he walked to the fence to get his hat after decedent had been shot, and that, "After the struggle when I went back to the fence to get my hat, I stooped over there to get my hat and I remember seeing a pocketbook or something laying alongside the fence, but I did not bother it that I can remember about." On cross-examination, when asked about the wallet, he testified: "I don't remember picking it up. I just slightly remember seeing one. I wouldn't say it was a wallet or what it was." He also admitted that he testified at the coroner's inquest, when asked if the pocketbook belonged to decedent, that he did not know, that he lost it somewhere on the way home, but that he never looked inside of it. From this evidence the jury had a right to infer that the various papers and cards were taken from the body of decedent and that, at the time they were so taken, they were contained in the wallet or billfold mentioned in the information.

[2] As to appellant's second point, that the evidence was insufficient to justify either the verdict of robbery or the verdict of murder, an examination of the record shows a decided conflict in the evidence. Upon sufficient evidence the jury has decided against the appellant, and this court cannot interfere.

[3] Appellant makes the point that the court erred in admitting in evidence testimony as to the manner of acquisition of the guns used by and in possession of defendants at the time that the crime was perpetrated. At the time when the questioned evidence was received, by order of the trial court it was limited in its effect to the case of appellant's codefendant, and the court instructed that "evidence applicable as to one defendant can only be considered as against that particular defendant"; and it must be assumed that the jury heeded the instruction; hence appellant has no just cause for complaint in that regard.

We have considered the language of the deputy district attorney objected to by appellant, and feel that there was nothing said by said deputy that would be liable to prejudice the cause of the appellant in the eyes of the jury.

[4] Appellant's final point is that the court committed prejudicial error in giving the following instruction:

"You are instructed that the mere possession of stolen property, unexplained by a defendant, however soon after taking, is not sufficient to justify a conviction; it is a circumstance, which taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe, from the evidence, that a defendant was found in the possession of the property described in the information, after the alleged taking, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts, or conduct or declarations of the defendant, or any other circumstances tending to show the guilt of the accused.

"If the jury believe the property was stolen, and was in the possession of a defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, or the giving of a false account as to such possession, may be circumstances tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such."

Appellant's contention in this regard is that the giving of the quoted instruction amounted to grave error, in view of the fact that there was no evidence that the defendants had any stolen property in their possession, and were unable to explain the presence of it; that there was no evidence that either defendant was found in the possession of any of the property described in the information, and that there is no evidence whatever in the record to support the contention that the defendants were in possession of stolen property, and that an instruction on that subject was entirely outside the issues submitted to the jury.

We find no prejudicial error to appellant in the giving of this instruction by the trial court, for the reason that there was evidence, as heretofore shown, that defendant Griffin saw the wallet, that he said that he lost it somewhere on the way home, but claimed that he never looked inside of it; that the cards and papers were found under the window of appellant's apartment, all of which is sufficient for the jury to infer that appellant and his codefendant had been in possession of the stolen property, but, finding it worthless, had thrown it away.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

CARLON v. GRAY.[*]

Civ. 5305.

District Court of Appeal, Third District, California.

Sept. 18, 1935.

Rehearing Granted Oct. 1, 1935.

1. Justices of the peace 🔑135(4)

After motion for dismissal of action in justice of peace court for failure of plaintiff to comply with statute regarding allegations and verifications of complaint and service of affidavit, defendant was entitled to maintain action to restrain enforcement of judgment which subsequently was entered for plaintiff in such action (Code Civ. Proc. § 396a, as added by St. 1933, p. 1841, § 8).

2. Justices of the peace 🔑106

Where plaintiff in action in justice of peace court failed to comply with statute regarding contents and verifications of complaint and service of affidavit with summons, justice of peace could not proceed further in case without consent of defendant except to dismiss action (Code Civ. Proc. § 396a, as added by St. 1933, p. 1841, § 8).

3. Appeal and error 🔑1008(1)

In suit to restrain enforcement of judgment obtained in justice of peace court, finding of trial court that defendant in prior action had not received amended complaint, and that there had been no service of such complaint upon her, was conclusive, in absence of showing that, prior to submission of defendant's request to dismiss action, there had been service of notice as required by statute, and hence defendant was entitled to injunction to restrain enforcement of judgment which was rendered by justice of the peace (Code Civ. Proc. § 396a, as added by St. 1933, p. 1841, § 8).

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge.

Action by Donna T. Carlon against John R. Gray. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. H. Hatfield, of Sacramento, for appellant.

Rowan Hardin, of Sonora, for respondent.

MONCUR, Justice pro tem, delivered the opinion of the court.

Plaintiff in this action seeks to restrain the defendant, as constable of the Third township in and for Tuolumne county, Cal., from selling one Cadillac tow car and one Chevrolet truck under execution from the justice's court of Sacramento township, Sacramento, Cal.

It appears that on August 31, 1933, the Sacramento Board of Trade, a corporation, commenced an action in the justice's court of said Sacramento township against the plaintiff, which action was for an alleged demand of less than $300, and which action was within the jurisdiction of justice's courts of class B jurisdiction as provided by the provisions of section 112 of the Code of Civil Procedure of this state as amended by the statutes of 1933 (St. 1933, p. 1814, § 23); that the complaint so filed in said justice's court action was not verified; that the summons in said action was issued on August 31, 1933; a copy of said unverified complaint and the summons were served upon respondent plaintiff herein in Groveland township, or the Third township of the county of Tuolumne, which place was the then residence of the plaintiff herein; that there was not served with said summons an affidavit of the plaintiff, or any affidavit from which it could be determined which court was the proper trial court for the trial of the action; that on or about October 2, 1933, plaintiff herein filed an affidavit in the said justice's court of Sacramento township setting forth the facts of the service so made upon her, and requested the said justice's court to dismiss said action; that a copy of said affidavit and request was

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[*] For subsequent opinion see 52 P.2d 966.

served upon the attorney representing the plaintiff in said justice's court action; that, after hearing, said justice's court on December 11, 1933, made its order denying the request to dismiss the said action and did thereafter enter judgment against respondent herein.

It also appears that on September 23, 1933, and before plaintiff's motion and affidavit to dismiss were served or filed, the plaintiff in said justice's court filed its first amended complaint, and, it is alleged, served a copy thereof upon respondent herein, which said service was made by mailing and proof of which was made by affidavit of mailing, in the usual manner.

However, it is claimed by respondent that she did not receive the said first amended complaint through the mail or otherwise.

Section 396a of the Code of Civil Procedure, as added in 1933 (St. 1933, p. 1841, § 8), provides as follows: "In all actions and proceedings within the subject matter jurisdiction of justices' courts of Class B, whether commenced in a justices' or municipal court, plaintiff must state facts in the complaint, verified by his oath, or in an affidavit of the plaintiff, from which it can be determined which court is, under the provisions of this title, the proper court for the trial of such action or proceeding. When such affidavit is filed, a copy thereof must be served with the summons. Unless such complaint or affidavit be filed, no further proceedings shall be had in the action or proceeding, except to dismiss the same, unless defendant consents in the manner hereinafter provided to the keeping of the action or proceeding in the court where commenced."

It is conceded that the complaint in the justice's court was unverified and that no affidavit was filed and served with the summons upon respondent, and it is also conceded that she has not at any time consented to the prosecution of the action in said justice's court as provided in said section 396a.

It is also claimed by respondent that the first amended complaint failed to comply with the provisions of the Code of Civil Procedure in respect to the required statement as to the court which is the proper one for the trial of the action. However, in view of the conclusions we have reached, it is deemed unnecessary to express an opinion upon this particular phase of the matter or upon the construction generally, particularly as to dismissal, of said section 396a.

[1] That an action of this kind is proper is definitely determined by the case of Isert v. Riecks, as Sheriff, etc., et al., 195 Cal. 569, 234 P. 371.

After trial of this action before the superior court of Tuolumne county, which court is herein designated as the trial court, the questions involved herein appear to have been fully presented. The pleadings and the affidavits were before the court, and it heard testimony to determine particularly the question as to whether the plaintiff actually received the first amended complaint herein referred to. After such trial and a consideration of the matter, the trial court reached the conclusion that respondent did not receive the first amended complaint and that there was no service thereof, and so found in its findings of fact.

[2, 3] It being apparent that with the failure of the plaintiff in the justice's court action to comply with the requirements of said section 396a in respect to the allegations and verifications of the complaint or of the service of the required affidavit with the summons that there could be no further proceedings had in the action, except to dismiss the same, without the consent of the respondent to further proceedings, and unless prior to the submission of the request of respondent herein in said justice's court to dismiss the said action there was a service of such further notice as to constitute the required due process, the finding of the trial court that respondent had not received the amended complaint, and that there had been no service upon her thereof, is conclusive upon this court, and we are satisfied that the proceedings in said justice's court were subject to dismissal; that no enforceable right was secured against respondent in said justice's court action; that the attempted sale of the said property of respondent under execution was without right; and that she was and is entitled to have the same restrained.

It therefore follows that the judgment of the trial court should be, and the same is hereby, affirmed.

We concur: **PULLEN, P. J.; THOMPSON, J.**

9 Cal.App.2d 138

PEOPLE v. VERNON.

Cr. 2732.

District Court of Appeal, Second District, Division 1, California.

Sept. 12, 1935.

1. Criminal law 🔑1134(10)

Denial of writ of error coram nobis by trial court for asserted lack of jurisdiction *held* to have no effect on power or province of reviewing court on appeal from such order to determine legal merits of application.

2. Criminal law 🔑997

Relief afforded by original common-law remedy of writ of error coram nobis is now available by motion to vacate judgment, and relief afforded by either procedure is identical.

3. Criminal law 🔑998

Motion to vacate judgment, to be effective, must be made within reasonable time after judgment has been rendered.

4. Criminal law 🔑997

Application for writ of error coram nobis, which was made 4½ years after conviction, *held* not made within "reasonable time"; hence writ was denied in absence of extenuating facts.

5. Criminal law 🔑997

Application for writ of error coram nobis, which was made 4½ years after conviction, on ground that guilty plea had been induced solely by coercion and duress, *held* properly denied as not made within "reasonable time," especially where defendant had presented motion to vacate judgment four years after its entry solely on ground that court was without jurisdiction to render judgment.

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

6. Criminal law 🔑997

Confession of guilt by one other than applicant for writ of error coram nobis will not furnish sufficient reason for issuance of writ, and allegation of newly discovered evidence is likewise unavailing for that purpose.

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Proceedings by the People of the State of California against Thomas Vernon. From a judgment denying a writ of error coram nobis, defendant appeals.

Affirmed.

Harry Wolpin, of Hollywood, and Arthur E. Briggs, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HOUSER, Justice.

With reference to the foundational facts herein, it appears that on December 13, 1929, in response to two separate charges of "wrecking a train" and of "robbery" contained in an indictment that had been returned against him, together with an allegation contained in said indictment that theretofore, on separate respective dates and at separate respective places, he had suffered a total of five convictions for the commission by him of different and various felonies, the defendant therein, Thomas Vernon, pleaded "guilty" to such charges, and at the same time admitted that he had suffered each of such five separate convictions; and that thereupon he was adjudged a habitual criminal and was sentenced to the state prison for the term prescribed by law. More than four and one-half years thereafter he caused to be presented to the trial court his application for a "writ of error, coram nobis," and as ground therefor in substance alleged that his plea of "guilty" to said charges was induced solely by coercion and duress practiced upon him, the alleged facts in that particular being in his application for said writ specifically set forth, and which application also included therein a copy of a "confession" said to have been made by a fellow prisoner of the defendant who also was serving a term of life imprisonment as a habitual criminal; which "confession" was to the effect that said fellow prisoner, together with two other persons not including the defendant, were the individuals who had committed the crimes of which the defendant had pleaded "guilty." In addition thereto, as a part of and as grounds for granting the application presented by the defendant, affidavits by certain respective persons were attached to said application, which affidavits purported to set forth facts constituting "newly discovered evidence," which, had it been submitted to and believed to be true by a jury by which he might have been tried on said charges, might have resulted in a verdict of acquittal of the defendant. Because of an order made by the lower court by which said application was denied for asserted lack of jurisdiction, the instant appeal therefrom is prosecuted to this court.

[1] Notwithstanding the limited reason assigned by the lower court for its denial of the application made by the defendant, in accordance with the ruling made by the Supreme Court of this state in the case of People v. Reid, 195 Cal. 249, 254, 232 P. 457, 36 A. L. R. 1435, such denial on the grounds stated has no effect upon either the power or the province of this court on appeal from such order to determine the legal merits of the application.

[2] It is apparent that the remedy which the applicant sought in the lower court was inclusive of, but withal comparatively but a very small part of, a remedial relief which, in the early stage of the development of common-law procedure, was obtainable by means of a "writ of error, coram nobis"; the use of which was recognized and permitted solely because of the absence at that time of the right to move for a new trial and the right of appeal from the judgment. In that particular situation, the writ actually issued. Not that in appropriate circumstances such a writ may not now properly issue in this state [People v. Superior Court (Cal. Sup.) 47 P.(2d) 724; Adler v. State, 35 Ark. 517, 37 Am. Rep. 48; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; State v. Calhoun, 50 Kan. 523, 32 P. 38, 18 L. R. A. 838, 34 Am. St. Rep. 141; monographic note, 97 Am. St. Rep. 362, 372]; but that the issuance of such a writ, as such, is unknown to the ordinary practice, is clearly indicated, if not attested, by a reference to the several cases in which a right to relief of the character of that here sought has been the subject of inquiry; from all of which it is manifest that that which remains of the relief which ordinarily was available as part of the original common-law remedy of "writ of error, coram nobis," is made equally available, not necessarily, as formerly, by the issuance of the writ, but simply by the legal machinery attendant upon a motion to vacate the judgment. It therefore results that, although the relief sought be of the nature of that included within and formerly afforded by a writ of error, coram nobis, because of its comparatively ancient origin and its correspondingly relatively recent disuse, the mystery and the magic which now apparently attach to such an appellation as applied to the proposed remedy are completely dispelled and obliterated by designating such remedy by the more simple and appropriate name of a motion to vacate the judgment. The practical result of such practice in effect and substance demonstrates that the relief that may be administered by the one form of procedure is identical with that in the other. Monographic note, 97 Am. St. Rep. 362; 2 R. C. L. 305. See, also, People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435; and, generally, 5 Encyc. P. & P. 27 et seq.

Following the presentation and subsequent hearing of a motion to vacate a judgment, it may be conceded that if it were established that a plea of "guilty" had been induced by means of force, coercion or duress exerted upon the person of a defendant in a criminal action, such a situation would furnish abundant reason for an order by which a former judgment rendered in pursuance of such a plea would be set aside and vacated. People v. Superior Court (Cal. Sup.) 47 P.(2d) 724; People v. Campos (Cal. Sup.) 43 P.(2d) 274; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435; People v. Mooney, 178 Cal. 525, 174 P. 325; In re Sargen, 135 Cal. App. 402, 27 P.(2d) 407; People v. Perez, 9 Cal. App. 265, 98 P. 870; State v. Calhoun, 50 Kan. 523, 32 P. 38, 18 L. R. A. 838, 34 Am. St. Rep. 131; Wheeler v. State, 158 Ind. 687, 63 N. E. 975; Alexander v. State, 20 Wyo. 241, 123 P. 68, Ann. Cas. 1915A, 1282; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; State v. Ray, 111 Kan. 350, 207 P. 192; 12 Cyc. 789.

But, although the facts alleged to exist in the instant matter would appear to be such as should squarely invoke the application of the principle thus announced, it is suggested that in consideration of the existence of unquestioned additional facts, the relief for which the defendant has prayed should be withheld. In brief, such facts are, firstly, that at all times since his plea of "guilty" was entered, with full personal knowledge on the part of defendant of the alleged facts and circumstances surrounding the making by him of such plea, without reasonable or any excuse offered or suggested in that behalf or connection, he has delayed and waited an unconscionable and unreasonable length of time, to wit, the space of more than four and one-half years without taking, or attempting in any manner to take, appropriate action in the premises, as far as such alleged facts were concerned; and secondly, that by the records of this court it affirmatively appears that on the 8th day of September, 1933, which was nearly four years after the date when he entered his said plea, on the alleged ground that the lower court "was without jurisdiction to render the particular judgment it did render," he presented to the said court his motion to vacate the judgment theretofore rendered against him; but that at that time and on that occasion he made no claim, nor did he then assert or allege in any form, any of the facts relating to "coercion or duress," upon which he herein relies as affording a reason for the granting of his present application for a writ of error, coram nobis, or, in substance and effect, the identical motion for an order by which the said judgment might be vacated.

[3, 4] As a matter of legal principle, the rule has been frequently announced that, in order that it may be effective and within the possibility of favorable action thereon a motion to vacate a judgment must be made "within a reasonable time" after such judgment has been rendered; and in this state the concrete examples of what should be construed as "a reasonable time" would seem to point to the conclusion that in the instant matter the delay has been so long that the prayer of the petitioner should not be granted. 18 Cal. Jur. 651, and authorities there cited. And in proceedings of the nature of that here under consideration in jurisdictions other than this state, it likewise has been ruled that, in circumstances such as are here present, the petitioner is entitled to no relief. State v. Stanley, 225 Mo. 525, 125 S. W. 475; Alexander v. State, 20 Wyo. 241, 123 P. 68, Ann. Cas. 1915A, 1282; Hawie v. State, 121 Miss. 197, 83 So. 158, 10 A. L. R. 205; State v. Latshaw, 291 Mo. 592, 237 S. W. 770; Washington v. State, 92 Fla. 740, 110 So. 259; monographic note, 97 Am. St. Rep. 362, 372; 5 Encyc. P. & P. 29.

[5] That the identical rule should prevail in this state is clearly indicated in the following cases: People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Campos (Cal. Sup.) 43 P.(2d) 274; People v. Superior Court (Cal. Sup.) 47 P.(2d) 724; People v. Black, 114 Cal. App. 468, 300 P. 43.

Assuming the correctness of the declaration hereinbefore made, to wit, that in legal effect in the practice in this state a petition for a writ of error, coram nobis, is nothing more nor less than a motion to vacate a judgment, from the records and files of this court it becomes evident that the ultimate relief for which the applicant prayed in his former motion to vacate the judgment that theretofore had been rendered against him was identical with the relief which he sought to obtain by the instant petition for a writ of error, coram nobis; the only substantial difference between the two legal vehicles employed by the petitioner being that the set of facts set forth in his former motion differs from the allegation of facts that appears in the instant petition.

It is manifest that within the "motion to vacate the judgment" presented by the defendant, in addition to the ground therein set forth, he might have included as a second ground or reason why the judgment should have been vacated, the same ground of "coercion and duress" that he has assigned in the instant petition for the writ of error, coram nobis. With reference to such a situation, although the attention of this court has been directed to no authority wherein was involved as a decisive feature of a criminal appeal the propriety of permitting in effect the presentation to the trial court of successive motions to vacate the judgment on grounds which, though differing one from the other or others, nevertheless were capable of being joined in the first of such motions, on principle no differentiating reason or argument is apparent why the rule in a criminal case should differ from that applied in a civil action. In the latter class of litigation, with respect to the right of a party to a renewal of a motion, as is said in the case of Ford v. Doyle, 44 Cal. 635: "But this leave will rarely be given upon the ground that the moving party can produce additional evidence in support of his motion, unless it also appears that a new state of facts has arisen since the former hearing, or that the then existing facts were not presented, by reason of the surprise or excusable neglect of the moving party."

In the case of Cozad v. Raisch Imp. Co., 208 Cal. 496, 281 P. 1017, in effect it is held that on the hearing of a motion, the decision of the court with relation thereto is conclusive as to all matters of fact presented, or which could have been presented, citing Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334, wherein the same rule was announced. See, also, Wheeler v. Eldred, 137 Cal. 37, 69 P. 619; Mission Film Corporation v. Chadwick P. Corporation, 207 Cal. 386, 278 P. 855. However, as stated in 18 California Jurisprudence, 660: "While it has been said that leave to renew will rarely be granted unless it appears that a new state of facts has arisen since the former hearing, or that the then existing facts were not presented by reason of surprise or excusable neglect, leave may, in the discretion of the court, be granted upon the same facts more fully stated." And that principle of law is reiterated in the case of People v. Brahm, 103 Cal. App. 247, 284 P. 256, wherein the defendant therein had sought leave to withdraw a former plea of "guilty" and to vacate a judgment that had been rendered against her. In that case it was held that "discretion rested with the court to decide whether or not it would permit such renewal."

Not to be understood as attempting to indicate that any limitation should be placed upon the several and varied situations with reference to questions of fact, the presence of any one of which might justify the issuance of a writ of error, coram nobis, but simply as an indication of different situations in which such a writ possibly or probably might issue, reference may be had to the case of People v. Reid, 195 Cal. 249, 259, 232 P. 457, 36 A. L. R. 1435, and the monographic note in 97 Am. St. Rep. 362, 371, wherein precedents are cited in which the question of the issuance of a writ of error, coram nobis, was involved in each of ten different classes of facts differing one from the other or the others.

Assuming the correctness of such decisions as far as they announce the applicability of the writ to a given state of facts, and herein, for the sake of illustrating the point, making some of them possibly applicable to the position occupied by the applicant herein, it becomes apparent that if no legal limitation be placed upon his asserted right, at his pleasure, to renew his motion to vacate the judgment, or to apply for a writ of error, coram nobis, based upon either facts theretofore stated in a former application, or to a motion theretofore presented by him for the ultimate purpose of vacating the judgment, or upon facts then known to him, the final and really conclusive adjudication of the question of whether the judgment rendered against him should be vacated may never be determined. For example, failing in his present attempt to vacate the judgment, after the lapse of an additional four and one-half years (as exists in the facts of the instant application), the defendant might make his third application on the ground that he was insane at the time he pleaded "guilty," which fact was unknown to both the court and the defendant's counsel [People v. Superior Court (Cal. Sup). 47 P.(2d) 724; Hydrick v. State, 104 Ark. 43, 148 S. W. 541; Linton v. State, 72 Ark. 532, 81 S. W. 608; Withrow v. Smithson, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762; Hawie v. State, 121 Miss. 197, 83 So. 158, 10 A. L. R. 205]; and assumedly being unsuccessful in that particular effort, and following the result of a possibly unsuccessful appeal from the order denying such application, again and again, four and one-half additional years thence ensuing between each of such successive motions, he might present to the court a fourth, a fifth, a sixth (and ad infinitum) motions, each based on the ground that his plea of "guilty" was procured by "extrinsic fraud" [People v. Superior Court (Cal. Sup.) 47 P.(2d) 724; People v. Campos (Cal. Sup.) 43 P.(2d) 274; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435; People v. Mooney, 178 Cal. 525, 174 P. 325; In re Sargen, 135 Cal. App. 402, 27 P.(2d) 407; People v. Perez, 9 Cal. App. 265, 98 P. 870; In re Ernst, 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681], which in its respective inducing facts might materially differ from any such facts theretofore set up in either or any of the preceding motions of the kind that had been made by the defendant, and of which facts at all times, presumptively or actually, he had full and complete knowledge.

[6] Reverting to the record herein, and especially to the alleged facts set forth in the petition, it is significant, but possibly only coincidental, that the presentation of the instant petition on the ground of alleged coercion and duress, under which it is alleged that the defendant labored,

and which facts are declared to have been the direct cause of his plea of "guilty," should have occurred so closely following the "confession" of guilt of the crime of which the defendant pleaded "guilty," by a fellow prisoner of defendant who, like the defendant, was and now is serving a term of life imprisonment as a habitual criminal But however that may be, it appears to be the law that in and of itself a confession of guilt by one other than the applicant for a writ of error, coram nobis, will not furnish a sufficient reason for the issuance of the writ (Powers v. State, 168 Miss. 541, 151 So. 730; Howard v. State, 58 Ark. 229, 24 S. W. 8); and the authorities are unanimous in declaring that "newly discovered evidence" is likewise unavailing for that purpose.

From the foregoing it follows that in the instant matter, in consideration of the facts, the pronouncement of a rule by which the asserted right of the applicant herein to a writ of error, coram nobis, would be recognized and validated, would be most disastrous in its results as far as order and system in the administration of justice are concerned.

It is ordered that the order from which the appeal is taken be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

ROBERTS v. CITY OF LOS ANGELES et al.*

Civ. 5348.

District Court of Appeal, Third District, California.

Sept. 17, 1935.

Rehearing Denied Oct. 17, 1935.

Hearing Granted by Supreme Court Nov. 14, 1935.

1. Municipal corporations 🔑289(1)

Proceedings for public improvements, expense of which is to be assessed on private property, are strictly in invitum.

2. Municipal corporations 🔑460

Assessment for public improvement is to be regarded as an entirety and assessment is void if it appears on face thereof that portion of assessment is for expense which is not legally chargeable on property assessed.

3. Municipal corporations 🔑455

Person to be assessed for public improvement is entitled to know nature of work for which assessment is to be levied.

4. Municipal corporations 🔑477

Assessment for maintenance of lighting posts and supplying of electric current for lighting portion of boulevard which included lump charge for "estimated cost of repairs and renewals" *held* void on ground that description was insufficient to inform property owners of nature of such charges (Gen. Laws 1931, Act 5215, § 1; § 2, subd. 2).

5. Municipal corporations 🔑477

Assessment for maintenance of lighting posts and supplying of electric current for lighting portion of boulevard which included lump charge for "collection and supervision fee" *held* invalid on ground that such charge was unauthorized under statute authorizing board of public works to make estimate of costs of public improvement and for "incidental expenses" in connection therewith (Gen. Laws 1931, Act 5215, § 1; § 2, subd. 2).

6. Statutes 🔑105(1)

Constitutional requirement that every act shall embrace but one subject, which subject shall be expressed in its title, should be liberally construed (Const. art. 4, § 24).

7. Statutes 🔑120(3)

Title of act providing for acquisition, installation, repair, and "maintenance" by municipalities of waterworks, electric power works, and other public works and utilities *held* not to include furnishing of electricity mentioned in act and assessment made therefor was invalid, since maintenance of street lighting system and use of it for lighting are different functions (St. 1913, p. 421; Gen. Laws 1931, Act 5215, § 1; § 2, subd. 2).

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Charles H. Roberts against the city of Los Angeles, E. J. Delorey, and others, as members of and constituting the board of public works of the city of Los Angeles. From a judgment for defendants, plaintiff appeals.

Reversed and remanded.

Hewitt & Anderson, Hewitt, McCormick & Crump, C. S. Price, and George W. Crouch, amicus curiæ, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Jerrell Babb, Deputy City Atty., all of Los Angeles, for respondents.

*For subsequent opinion see 61 P.2d 323.

Mr. Justice pro tem ROSS delivered the opinion of the court.

This appeal involves the validity of an assessment levied by the city of Los Angeles for the maintenance of lighting posts and appliances and the furnishing of electric current for the lighting of a portion of Sunset boulevard for a period of fourteen months. This action was brought by plaintiff, a property owner, to concel the assessment against him. Judgment in the trial court was in favor of the defendants.

The statute involved in these proceedings is the "Public Works and Utilities Act." Deering's Gen. Laws, p. 2679, Act 5215.

Appellant contends that the furnishing of electric current is not within the scope of the title of the statute, and that, therefore, as to any provision within the act for such furnishing of electricity the statute is unconstitutional under article 4, § 24, of the Constitution.

It is also contended that the assessment is invalid in that it includes certain items of incidental expenses, part for collection fees and part for supervision fees, and also a charge for "estimated cost of repairs and renewals." None of these items are assessed separately, but all are included in the total on which the assessment is based.

Appellant concedes that the city council observed in form all the steps required by the statute.

The complaint herein states a cause of action. The case of Hannon v. Madden, 214 Cal. 251, 5 P.(2d) 4, is not in point. This assessment is attacked because of alleged illegality, making it void. City Securities Co. v. Harvey, 176 Cal. 682, 169 P. 380.

[1] Proceedings for public improvements, the expense of which is to be assessed upon private property, are strictly in invitum.

[2] The assessment is to be regarded as an entirety, and is void if it appears upon the face that a portion of it is for expense which is not legally chargeable upon the property assessed. Ryan v. Altschul, 103 Cal. 174, 37 P. 339.

The assessment complained of here includes the cost of collecting the same, based on an estimate and itemized as "collection fees $309." This estimated amount is to be paid to the bureau of assessment of Los Angeles, which handles the collection of assessments from various districts within the city, maintaining a clerical force paid by the city from its general fund.

Similarly the assessment includes a "supervision fee," listed at $426. This is also an estimated amount, based on the law of averages, for a future service, and the supervision work is done by city employees, paid by the city, which is reimbursed to the extent of this estimated amount for the lighting district's share of the supervision costs.

There is also the item of estimated costs of repairs and renewals. This is based on estimates for future repairs, which may or may not be needed, which estimates also are made on the law of averages from the experiences as to breakage, etc., over a period of time in the past.

The statute in question here, in section 2, subd. 2, provides that the board of public works of the city shall make an estimate of the costs of said improvement and of the incidental expenses in connection therewith. This is the only mention of "incidental expenses" and the term is not defined in the statute, as it has been in most improvement acts.

[3, 4] A person who is to be assessed is entitled to know the work for which the assessment is to be levied. Williamson v. Joyce, 137 Cal. 107, 69 P. 854. In this case the person cannot know what he is paying for under the head of repairs and renewals. It may be several light posts and globes will be broken during any year, and it may be they will not. There is nothing to show the assessment payer but an estimate. Such a description of the work as used here in this respect is insufficient, and renders the proceeding void.

[5] There seems to be no authority for the inclusion of the incidental expenses hereinabove mentioned, that is, the collection and supervision fees, and for this reason also the assessment is invalid.

[6, 7] Although article 4, § 24, of the Constitution is to be liberally construed, it seems plain that the title of the act involved here does not embrace the furnishing of electric current which is mentioned at the end of section 1 of the act. The portion of the title (St. 1913, p. 421) applicable is as follows: "An act to provide for the acquisition, installation, construction, reconstruction, extension, repair and maintenance by municipalities of waterworks, electric power works, gas works, lighting works, and other public works and utili-

ties." The word "maintenance" would not cover the furnishing of electricity, as the maintaining of a street lighting system, and the use of it for lighting are two different things.

The assessment being considered invalid for these reasons, it is unnecessary to pass on the constitutional questions raised.

The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff as prayed for.

We concur: PULLEN, P. J.; THOMPSON, J.

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9 Cal.App.2d 259

PEOPLE v. MEDINA.

Cr. 2781.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1935.

Jury 🔑**29(6)**

That waiver of trial by jury in criminal case was not made by defendant until after court had started to impanel jury *held* not to invalidate waiver (Const. art. 1, § 7, as amended in 1928).

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Arthur Medina was convicted of rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant appeals from a conviction of rape. The sole contention of the defendant is that the waiver of a trial by jury was made after the court had started to impanel the jury and that the court could not try the case thereafter without a jury. The impaneling of the jury had not been completed. Article 1, § 7, of the Constitution, as amended in 1928, among other things, provides: "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel." The defendant does not contend that the waiver was not made in due form but only that it was made too late. There is nothing in the Constitution which requires that the waiver be made before the court starts to impanel the jury, and there is no basis in common sense or morals for the defendant's contention.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

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9 Cal.App.2d 274

DUNHAM v. CANTLAY & TANZOLA, Inc., et al.

Civ. 9821.

District Court of Appeal, Second District, Division 2, California.

Sept. 25, 1935.

1. Automobiles 🔑**244(19)**

In action by brakeman for injuries received in falling or being thrown from freight car by force of impact when car was struck by defendants' truck, which crashed through traffic gates, evidence *held* to sustain verdict for brakeman.

2. Automobiles 🔑**243(5)**

In brakeman's action for injuries received when truck struck freight car at railway crossing, numerous persons being present at time of collision, evidence of other accidents at same crossing, happening before and after one which gave rise to suit, *held* inadmissible, since such evidence is admissible only when there are no eyewitnesses to accident.

3. Automobiles 🔑**246(58)**

In action by brakeman who was riding on freight car for injuries received when car was struck by defendants' truck, instructions relating to rights of one acting in face of imminent danger *held* necessary where defendant claimed that brakeman was injured, not by being thrown from freight car by force of collision, but by voluntarily jumping from place of safety on top of car to ground.

4. Appeal and error 🔑**1064(4)**

In action for injuries received by brakeman riding on freight car which was struck at crossing by truck carrying light fuel oil which did not stop as it approached railway tracks, instruction relating to duty of operator of truck carrying inflammable liquid to bring truck to complete stop before crossing railway tracks, which defined "inflammable" as "combustible," *held* not prejudicial where contents of truck actually ignited as result of accident, justifying conclusion that they were in fact inflammable.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Luman S. Dunham against Cantlay & Tanzola, Incorporated, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

See, also, 140 Cal. App. 132, 34 P.(2d) 1031.

George P. Kinkle, of Los Angeles, for appellants.

Clyde C. Shoemaker, of Los Angeles, for respondent.

GOULD, Justice pro tem.

When defendants' truck, loaded with fuel oil, crashed through traffic gates and into a freight car on top of which plaintiff was riding as brakeman, plaintiff, in falling or being thrown from the car by the force of the impact, suffered injuries for which a trial jury awarded him $7,500 damages.

[1] Defendants' appeal concerns itself for the most part with alleged contradictions in plaintiff's testimony; with the claim that he and his employer, Pacific Electric Railway Company, were guilty of contributory negligence such as to bar any recovery; with the contention that plaintiff's injuries resulted from his own independent act in jumping from the freight car to the ground, and with the claim that the jury's verdict was based on speculation and surmise. As to all of these matters it is sufficient to say that there is substantial evidence in the record to sustain the verdict of the jury, and with such conclusion we cannot interfere under such circumstances.

[2] Appellants also complain that the trial court excluded evidence of other accidents at the same crossing, happening before and after the one which gave rise to this suit. In such ruling the trial court was correct. Such evidence is only admissible when there are no eyewitnesses to the accident. Boone v. Bank of America Nat. Trust & Savings Ass'n, 220 Cal. 93, 29 P.(2d) 409. In the present case numerous persons were present at the time of the collision and were called as witnesses at the trial.

[3] Objection of appellants to the court's instructions with relation to the "imminent danger" doctrine is not well taken. Such instructions became appropriate when defendants claimed that plaintiff was injured, not by being thrown from the freight car by force of the collision, but by voluntarily jumping from his place of safety on top of the car to the ground. There was thus presented to the jury the issue as to whether he was thrown from the car or whether, faced with possible injury by remaining on the car, he attempted to escape an imminent danger by leaping to a place of supposed safety. With such an issue raised by the evidence, instructions relating to the law governing that situation became not only appropriate, but necessary.

Of more importance is appellants' argument relating to the meaning of the word "inflammable," as used in section 135 of the California Vehicle Act. This section as amended in 1931 (Stats. 1931, p. 2127) provides that "the operator of any motor truck carrying * * * explosive or inflammable liquids of any specific gravity * * * shall before crossing at grade any track or tracks of a steam railroad or interurban or suburban electric railway, bring his * * * truck to a full and complete stop within not less than ten feet nor more than fifty feet from the nearest rail of the track nearest to the front of such * * * truck." In this case it was conceded that the truck involved in the collision was approaching an electric railroad track, that the truck was loaded with 5,466 gallons of a liquid petroleum product commonly known as "light fuel oil," having a flash point of 186 degrees Fahrenheit, and that the truck did not make the stop as it approached the railroad tracks.

[4] The court gave this instruction, among others, upon the subject: "If the cargo of the truck was not 'inflammable liquid' then it was not the duty of defendant * * * to bring his truck to a stop before crossing the tracks in question under the terms of the California Vehicle Act, and in the absence of other circumstances requiring him to stop, he

would not have been guilty of negligence in proceeding across the tracks. The word inflammable means 'capable of being easily set on fire; easily kindled, combustible.'" Appellants strenuously contend that by defining the term "inflammable" as "combustible" the trial judge removed from the jury the possibility of determining whether or not the contents of the truck made it necessary for the driver to bring it to a full stop as he approached the railroad crossing. Appellants admit that the contents were "combustible," that is, capable of being burned; and as a matter of fact the oil which spilled from the overturned truck, whether kindled by the gasoline from the broken fuel tanks or by a spark from the impact of the truck and freight car, did burn and create a conflagration in the street for an hour or more, after the collision. "Inflammable," according to appellants' contention, has a much narrower meaning than "combustible"; it should be limited to such meanings as "easily kindled," "easily set on fire," "readily burning," and the like. In fact, appellants requested that the court give an instruction "that the word 'inflammable' does not mean merely capable of burning, but rather it has the meaning of 'readily burning' or 'easily set on fire.'"

Lexicographers do not determine the question. In Webster's International Dictionary "combustible" is given as one of the definitions of the word "inflammable"; and the word "inflammable" is likewise one of the definitions of the word "combustible." Funk & Wagnall's Standard Dictionary does not use the words interchangeably. "Inflammable" is there defined as "easily set on fire."

But regardless of the definition to be given to the word "inflammable," and even assuming that the trial court herein gave it too broad a scope by identifying it with with the word "combustible," nevertheless appellants were not injured by the instruction. Without dispute, the contents of the truck did ignite at the time of the collision or within a few minutes thereafter, resulting in a great conflagration and giving an apt illustration of the dangers resulting from a collision involving a truck carrying inflammables. From the evidence in this case, the only reasonable conclusion that can be reached is that the contents of the truck were in fact inflammable. If there was error in the instruction, appellants, not being injured thereby, may not complain.

Other instructions to which appellants object have been examined, but we find no merit in the points raised. No objection is made to the verdict upon the ground that the damages awarded are excessive.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

* * *

9 Cal.App.2d 171

PEOPLE v. ROSE.

Cr. 2750.

District Court of Appeal, Second District, Division 1, California.

Sept. 16, 1935.

Rehearing Denied Sept. 24, 1935.

1. Larceny 🔑65

Evidence *held* sufficient to sustain conviction of petit theft.

2. Criminal law 🔑412(3)

In prosecution for petit theft, statements of defendant in regard to conversation between police and alleged accomplice at which defendant was present and which involved defendant in commission of crime *held* properly admitted for purpose of proving truth of statements made, although on trial defendant denied having been present at such conversation.

3. Witnesses 🔑337(5)

Defendant who offered himself as witness became subject to same rules for testing his credibility before jury, by impeachment or otherwise, as any other witness, and hence admission of questions concerning prior felony which was charged in indictment, but which defendant had admitted, was not error (Pen. Code, § 1025).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Gustave Rose, who admitted prior conviction of a felony, was convicted of petit theft, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

On March 18, 1935, the rumble seat of an automobile driven by a cigarette salesman was pried open and a suitcase and hat belonging to the salesman were lifted from the inside. The suitcase contained cartons of cigarettes and some miscellaneous articles. By information charging petit theft and prior conviction of a felony, which latter charge defendant admitted, defendant was brought to trial for stealing the cigarettes, valued at $20, contained in the suitcase. No one saw defendant open the rumble seat and actually take the articles described. The testimony showed, however, that the salesman parked his car approximately at 3 p. m. and encountered the defendant a few minutes later, whom he knew casually, in company with one Sherman, and that shortly after 3 p. m. defendant and Sherman entered the back yard of a dwelling within a few blocks of where the automobile was parked, one of them carrying a suitcase. An eyewitness testified that he saw defendant and Sherman in the back yard, saw them open the suitcase and take cartons of cigarettes out of it, and that both men then left leaving the suitcase and its remaining contents behind. The eyewitness followed them to the front steps of an apartment house a short distance away and saw Sherman wrapping up cartons of cigarettes "in a piece of light paper." Shortly thereafter, the witness notified the police and both men were almost immediately arrested. In a search of defendant's room the police found a hat. At the trial the salesman testified that the suitcase and such contents thereof which had been left behind in the back yard referred to were his property, and also that the hat which officers found in defendant's room was his (the salesman's) hat. After defendant's arrest, according to the testimony of one of the police officers, the following conversation took place between the defendant and the officer: "* * * We asked Mr. Rose what he had done with the cigarettes and he studied a little while and he said: 'If you boys will give me about half an hour, I will let you know if I am going to have anything to say or not,' and we told him: 'All right,' and we went into the detective bureau, and in about half an hour we went back in the jail, and he says: 'Well, I have decided I am not going to say anything; I am going to try to beat this rap;' that is about the substance of the conversation."

At the trial the defendant denied the above conversation, denied that he had taken the suitcase or hat or anything else out of the rumble seat of the automobile, and asserted he had no knowledge of or connection with the theft, and he explained the hat was found in his room because it was left there by Sherman. Trial was had by jury, defendant was found guilty, sentenced accordingly, and from the judgment of conviction and the order denying his motion for new trial, defendant prosecutes this appeal.

[1] The first point raised is that the evidence is insufficient to sustain the verdict. The foregoing résumé of facts is made only from such evidence with the admissibility of which the defendant does not quarrel. In our opinion it is sufficient to sustain the verdict of guilt. People v. Gardner, 125 Cal. App. 192, 195, 13 P.(2d) 779. With reference to the evidence upon which we have relied, defendant in effect concedes its admissibility, but asserts that the evidence of the eyewitness, who saw defendant and Sherman open the suitcase, is not satisfactory in so far as it fixes the identity of the defendant. In this respect, the record shows the following:

"Q. Where were you approximately at three in the afternoon when you saw this defendant? A. I was in my kitchen. * * *

"Q. You recognize the defendant as being one of them? A. Yes, sir."

There can be no question but that the jury was warranted in concluding from the above that the defendant was one of the men seen by the eyewitness in the backyard.

[2] It is next urged that it was error to admit in evidence a conversation between Sherman and one of the police officers, the testimony of the officer showing that the conversation was in the presence of defendant. This conversation was of such a nature that defendant was involved in the commission of the crime by statements made by Sherman. Defend-

ant was asked what he had to say in regard to the statements made by Sherman, and, according to the officers, said: "He did not know anything about it. * * *" At the trial defendant denied being present at the conversation. The objection to the admission in evidence of defendant's statements or acts at such time was properly overruled, as his failure to reply or his activities or his statements, if any, under such circumstances, are properly admissible for the limited purpose of proving the truth of the statements made. People v. Bishop, 54 Cal. App. 129, 131, 201 P. 328; People v. Shelest, 62 Cal. App. 213, 217, 216 P. 389; People v. Fay, 82 Cal. App. 62, 72, 255 P. 239.

[3] Finally, defendant asserts that it was error for the trial court to permit the district attorney to question him concerning the prior felony charged in the indictment which defendant had admitted. Pen. Code, § 1025. Defendant, however, took the witness stand in his own defense. "When the defendant offers himself as a witness he becomes subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness." People v. Oubridge, 38 Cal. App. 68, 175 P. 276; People v. Rogers, 94 Cal. App. 470, 472, 271 P. 351; People v. Rosencrantz, 95 Cal. App. 92, 94, 272 P. 786.

The judgment and order denying defendant's motion for new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

NORDIN v. EAGLE ROCK STATE BANK et al.

Civ. 10368.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1935.

As Modified on Denial of Rehearing Oct. 16, 1935.

Hearing Granted by Supreme Court Nov. 22, 1935.

Judgment 🔑243

In action against two banks for money had and received in which judgment was rendered for plaintiff, court *held* without jurisdiction to render judgment against two other banks which had purchased assets of defendant banks, where such purchasing banks had been brought into court only by order to show cause, since purchasing banks were not parties to action and were entitled to day in court upon question whether they had assumed liabilities of defendant banks.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by C. O. Nordin against the Eagle Rock State Bank and another, in which an order to show cause was issued, directed to the Bank of America National Trust & Savings Association, a national banking association, and the Bank of America, a banking corporation organized under the laws of the state of California. From a judgment in favor of the Bank of America National Trust & Savings Association and the Bank of America, plaintiff appeals.

Affirmed.

Horton & Horton, Joseph K. Horton, and Holbrook, Taylor, Tarr & Horton, all of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The primary contention of the plaintiff (appellant) on this appeal is that the trial court erred in holding that it was without jurisdiction to enter judgment against the respondents (who were not parties to the action) and in refusing to give judgment against them for that reason.

The plaintiff filed his complaint in the customary form for money had and received against the Eagle Rock State Bank and the Monterey Park Commercial & Savings Bank, hereafter called the defendants. The defendants answered, and judgment was entered that plaintiff take nothing by his action. Upon appeal from said judgment, the District Court of Appeal, Third Appellate District, reversed the judgment of the trial court, with directions to render judgment against the defendants. Nordin v. Eagle Rock State Bank et al., 139 Cal. App. 584, 34 P.(2d) 490. Upon filing the remittitur in the superior court, an order to show cause was issued directed not only to the defendants but to the respondents herein, who, as heretofore stated, were not parties to the action, upon an affidavit setting forth that the respondents had purchased all of the business and assets of the defendants and the consolidation of the respondents. The affidavit also set forth the assumption of all the liabilities of the defendants by the respondents. Upon the hearing of said order to show cause, the respondents made a "special and limited appearance," calling attention to the fact that the order to show cause was not supported by any petition or motion; that neither of the respondents was a party to the action; and that the court was without jurisdiction to enter any judgment in the action against them. Upon the hearing of the order to show cause, the trial court ordered judgment against the defendants in favor of the plaintiff, but denied judgment against the respondents. The appeal is from the judgment in so far as the same does not provide for judgment against the respondents.

It should be noted that the plaintiff does not claim there was a consolidation of the defendant and the respondent banks such as results in both banks continuing their identity in the consolidated corporation such as is provided for by section 31a of the Bank Act (St. 1909, p. 87, § 31a, as added by St. 1913, p.152, as amended by St. 1929, p. 448) and such as it is claimed took place between the respondents herein.

The plaintiff furnishes authorities in support of its contention that the respondents through the purchase of the assets of the defendants succeeded to all obligations and liabilities of the defendants, but in all of these cases cited by the plaintiff the successor bank was a party to the action, and as such had been given its day in court after due process. In none of such cases was it sought to obtain under an order to show cause a judgment against a purchasing bank in an action to which the latter was not a party. Supposing that the respondent banks had purchased the defendant banks, thus assuming the obligations of the defendant banks, still the respondents are entitled to their day in court, either on a supplemental complaint in the original action or in a new and separate action, on the question whether they had purchased the defendant banks. We have not been cited to any authority in law, and we know of none, which would permit a judgment against an assumer for an obligation assumed by it otherwise than by an action in which such assumer is a party. The plaintiff's contention is contrary to our judicial notions of due process. Since the trial court did not have jurisdiction to enter judgment against the respondents, the other contentions of the plaintiff need not be discussed.

Judgment affirmed.

I concur: WOOD, J.

◆

9 Cal.App.2d 295

VOLAT v. TUCKER et al.

Civ. 10400.

District Court of Appeal, Second District, Division 2, California.

Sept. 27, 1935.

Hearing Denied by Supreme Court Nov. 25, 1935.

1. Automobiles 🔑244(20)

In automobile guest's personal injury action against host, evidence *held* to support finding that defendant was not guilty of willful misconduct.

2. Appeal and error 🔑931(1)

In guest's action for injuries received in automobile accident, appellate court must indulge all reasonable inferences to support findings and judgment.

3. Appeal and error 🔑1008(1)

Where it was not shown by findings of trial court that evidentiary facts set out in detail in findings were only ones proved at trial, or that court found ultimate fact from such probative facts alone, appellate court could not disregard ultimate fact merely because some of probative facts did not support ultimate fact.

Appeal from Superior Court, Los Angeles County; H. S. Schaffer, Judge.

Action by Morris Volat against G. H. Tucker, Lawrence Israel, and others. Judgment for defendant Israel, and plaintiff appeals.

Affirmed.

Charles C. Montgomery and Ben C. Cohen, both of Los Angeles, for appellant

Lasher B. Gallagher, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

Plaintiff (appellant) was a guest in the car of defendant (respondent) Lawrence Israel and was severely injured. In an amended complaint, plaintiff charged defendant with willful misconduct. A first trial resulted in a judgment in favor of plaintiff, but the court granted a motion for a new trial, which order is not before us for review (Furlow, etc., Co. v. Balboa, etc., Co., 186 Cal. 754, 200 P. 625), and the second trial resulted in a judgment in favor of defendant, the court finding that defendant was not guilty of willful misconduct.

[1] It is the first contention of plaintiff that this finding is contrary to the undisputed evidence. We have studied the briefs and read the transcripts, and we are satisfied that there is substantial evidence to support this finding of the trial court. We do not set forth herein the facts and circumstances upon which we rely for this statement for reasons which are fully set out in the case of Koeberle v. Hotchkiss, 48 P.(2d) 104.

[2, 3] The question whether defendant was or was not guilty of willful misconduct is not one of law, but one of fact for determination by the fact finder. Plaintiff makes an extensive review of many of the cases involving willful misconduct, calling attention in his review that the facts in the instant case are similar to facts in some cases which went for plaintiff, and that they are dissimilar to facts in other cases which went for defendant. But after reviewing the cases, plaintiff admits that "no hard and fast rule can be laid down as to when willful misconduct commences and gross negligence ends." In reviewing the sufficiency of the findings to support the judgment, plaintiff disregards the finding of the ultimate fact that defendant was not guilty of willful misconduct, and relies wholly upon certain mere probative facts which are set out in detail in the findings. It is our duty on appeal to indulge all reasonable inferences to support the findings and judgment. It is not shown by the findings that these evidentiary facts were the only facts proved at the trial, or that the court found the ultimate fact from these probative facts alone. In the absence of such showing, the mere circumstance that some of the probative facts do not support the ultimate fact will not permit us to disregard the ultimate fact if there is substantial evidence to sustain the finding of that fact. 2 Cal. Jur. 871, § 511, and cases cited.

Plaintiff relies greatly upon the cases of Edwards v. Bodenhamer, 46 P.(2d) 202, and Gieselman v. Uhlman, 45 P.(2d) 819, both of which were decided on appeal by the Second Appellate District, Division Two. In neither of those cases did the court undertake to determine as a matter of law that certain facts constituted willful misconduct, merely that in one case there was substantial evidence to sustain the findings of the fact finder and in the other that the evidence was sufficient so that the case should have been submitted to the jury, rather than go off on an order for a nonsuit. The court said, "It was a question for the jury to determine."

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

9 Cal.App.2d 228

MUNTON v. BEKINS et al.

Civ. 10134.

District Court of Appeal, Second District, Division 2, California.

Sept. 23, 1935.

Hearing Denied by Supreme Court Nov. 21, 1935.

1. Licenses 🔑39

In action to recover amount due because of stockholders' statutory liability, failure to make findings on separate defenses that stock was void because issued in violation of Constitution of state of Delaware and that persons selling stock to defendant were not bona fide owners thereof, and that sales made in California were in violation of Corporate Securities Act, *held* to require reversal of judgment for plaintiff, since defendant would not be liable if defenses were supported by evidence (St. 1917, p. 673, as amended; Civ. Code, § 322).

2. Licenses 🔑39

Rule that estoppel may not ordinarily be invoked to give validity to contract which is void through violation of law applies to shares of stock void because of absence of nonconformity with corporation's permit (St. 1917, p. 673, as amended; Civ. Code, § 322).

3. Licenses 🔑39

Even if stockholder was estopped to deny nullity of stock, such estoppel did not cure trial court's error in failing to make findings on defenses to stockholder's statutory liability (St. 1917, p. 673, as amended; Civ. Code, § 322).

4. Executors and administrators ⚿453(2)

Failure of judgment against deceased's estate to provide that executor pay judgment in course of administration *held* not to invalidate judgment on claim against estate, since judgment, upon becoming final, conclusively established validity of claim against estate for amount of judgment (Probate Code, § 730).

◆

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by W. J. Munton against one Bekins and Clayton I. Chandler, administrator of the estate of Wilbur F. Chandler, deceased, and others. From a judgment for plaintiff, the second-named defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Howard F. Shepherd, of Los Angeles, and Harris, Willey, Griffith & Harris and William C. Crossland, all of Fresno, for appellant.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the respondent in an action against the appellant (a defendant) and other alleged stockholders of the Hollywood Dry Corporation to recover moneys alleged to be due by reason of the statutory stockholders' liability formerly embraced in section 322 of the Civil Code.

[1-3] Appellant complains because the trial court did not make findings on his separate defenses. In a fifth and separate defense the appellant alleged that all shares of the capital stock of said corporation standing in the name of the appellant's decedent at the times alleged in the complaint were issued by said corporation in the state of Delaware without receiving any cash, labor done, personal property, real estate, or leases thereof actually acquired by said Hollywood Dry Corporation (which would make the stock void because issued in violation of the Constitution of that state). As a seventh and separate defense the appellant alleged that all of said shares were sold to the said appellant's decedent in the state of California by persons, not bona fide owners of such shares of stock disposing of their own property for their own account, but that said sales were made directly or indirectly for the benefit of the issuer of said shares of stock of said corporation for the direct or indirect promotion of a scheme or enterprise with the intent of violating and evading the Corporate Securities Act of the state of California (St. 1917, p. 673, as amended). If these defenses were, or either of them was, sustained by the evidence, the stock was void under the law as it then existed, and the appellant was not a stockholder of the corporation, and no recovery might be had against him as such. Golden Eagle Milling Co. v. Albin, 219 Cal. 357, 26 P.(2d) 475; Live Oak Cemetery Ass'n v. Adamson, 106 Cal. App. (Supp.) 783, 288 P. 29; Honn v. Hamer, 81 Cal. App. 276, 253 P. 336. There was substantial evidence tending to support these defenses. The trial court made no finding whatever with regard to either one of them, and the appellant is entitled to a reversal on this ground. 2 Cal. Jur. 1032, and cases cited. Respondent relies upon the doctrine of estoppel. But numerous California cases have held that the doctrine of estoppel may not ordinarily be invoked to give validity to a contract which is void through violation of law, and this rule has been declared and applied in cases dealing with shares of stock void because of the absence of or nonconformity with a permit. See Golden Eagle Milling Co. v. Albin, supra, and cases therein cited. Furthermore, the estoppel, if good, would not cure the failure of the trial court to make findings on said defenses.

[4] The judgment fails to provide that the executor pay the same in due course of administration. But the law adequately takes care of this. Probate Code, § 730. The judgment is upon a claim against the estate, and while such a judgment, when it becomes final, conclusively establishes the validity of the claim for the amount of the judgment, yet the judgment takes on the status merely of an allowed claim. This and other points raised by the appellant will not appear on a retrial.

Judgment reversed.

We concur: WOOD, J.; FRICKE, Justice pro tem.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

9 Cal.App.2d 285

KAMISCHER v. JOHN HANCOCK MUT. LIFE INS. CO.

Civ. 10416.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1935.

Hearing Denied by Supreme Court Nov. 25, 1935.

Appeal and error 🔑1195(3)

Decision on former appeal authorizing recovery on life policy, despite fact that no premium had been paid at time of insured's death, on ground that language of policy constituted acknowledgment of receipt of premium, precluding defense that premium was not paid, *held* "law of the case," controlling contention on retrial that beneficiary must establish that extension of credit was given to insured because premium was not paid at date of issuance of policy.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Anna Kamischer against the John Hancock Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant.

Pelton & Warne, of Los Angeles, for respondent.

GOULD, Justice pro tem.

On or about April 8, 1931, appellant issued and delivered its life insurance policy for $5,000, with an additional $5,000 for accidental death, to Meer Kamischer, with respondent, Anna Kamischer, wife of insured, as beneficiary. Insured met accidental death by drowning May 31, 1931. No premium had been paid at that time, but the first premium was paid the day after insured's death. Upon refusal of appellant to pay the amount of the policy, respondent filed suit. On the first trial appellant's motion for nonsuit was granted, but on appeal from the subsequent judgment this court reversed that order. Kamischer v. John Hancock, etc., Co., 1 Cal. App. (2d) 629, 37 P.(2d) 126. Upon a retrial of the case in the superior court, judgment was entered for the beneficiary and against the insurance carrier in the sum of $10,000 and interest.

Appellant now urges that, inasmuch as the premium was not paid at the date of issuance of the policy, the beneficiary must establish that an extension of credit was given to the insured, if she is to recover. This point was necessarily involved in this court's prior determination of the matter. In its opinion this court said: "The language of the policy * * * is in effect an acknowledgment of the receipt of the premium, and by reason of the Code provisions [section 2598, Civ. Code] respondent is precluded from the defense that the premium was not paid." We regard the entire question as settled by the former appeal, which established the law of the case and was proper to have been considered by the court in the trial from which the present appeal eventuated. Estate of Baird, 193 Cal. 225, 223 P. 974.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

PHELPS et al. v. AMERICAN MORTGAGE CO. et al.*

Civ. 5344.

District Court of Appeal, Third District, California.

Sept. 23, 1935.

Hearing Granted by Supreme Court Nov. 11, 1935.

1. Mortgages 🔑164

Where two trust deeds were executed on same day, deed which was recorded in volume of records preceding that in which other deed was recorded was presumed to have been filed for recordation before deed which appeared in subsequent volume.

2. Mortgages 🔑164

In suit against mortgagee and trustee for fraudulent execution of trust deed on property also covered by trust deed securing plaintiffs' notes and sale of property under alleged fraudulent trust deed, allegations of amended complaint that execution of fraudulent deed and subsequent acts of defendants thereunder were unknown to plaintiffs *held* ineffective to state cause of action where trust deed of which plaintiffs claimed to have had no knowledge had been recorded in volume of records preceding that in which trust deed under which plaintiffs claimed was recorded.

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*For subsequent opinion see 59 P.2d 95.

3. Fraud 🔑43

In action for relief under claim of fraud, deceit, or concealment, such matters and facts constituting them must be specifically alleged.

4. Fraud 🔑43

In suit against beneficiary of trust deed and trustee for fraud in execution of trust deed to property also covered by trust deed securing plaintiffs' notes, and sale of property under alleged fraudulent deed, amended complaint which alleged that execution of deed and sale were unknown to plaintiffs but which failed to set forth specifically facts of fraud or concealment by which plaintiffs were precluded from receiving constructive notice of execution of deed and notice of sale which was available to them in records of county *held* insufficient to state cause of action.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Suit by Foster C. Phelps and others against the American Mortgage Company, the Mortgage Guarantee Company, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Reed & Vernon, of Los Angeles, for appellants.

Alvan M. Palmer, of Los Angeles, for respondent.

Mr. Justice pro tem MONCUR delivered the opinion of the court.

Plaintiffs above named are appealing from a judgment of dismissal of their fourth amended complaint, following the sustaining of a demurrer thereto by the trial court, and without leave to amend. The said fourth amended complaint, after alleging that American Mortgage Company, Mortgage Guarantee Company, and Title Guarantee & Trust Company, at the times therein mentioned, were corporations, sets forth, so far as are deemed necessary for a decision in this matter, and as nearly as may be chronologically, as follows:

That on or about November 22, 1926, Arthur Gilman and Nellie Gilman executed to defendant mortgage company 125 promissory notes, each in the principal sum of $1,000, each due on November 22, 1931, with interest at 8 per cent., payable quarterly, and at the same time, as security for the payment of said notes, the said Gilmans executed their deed of trust to defendant Title Guarantee & Trust Company, as trustee, and to American Mortgage Company, as beneficiary, and which deed of trust was, on November 23, 1926, in book 6545, at page 8 of the records of Los Angeles county, recorded in the office of the recorder thereof, and on or about November 23, 1926, defendant Title Guarantee & Trust Company accepted the trust as provided for in said deed of trust.

That thereafter, and prior to January 1, 1931, said defendant American Mortgage Company with the knowledge of the defendant Title Guarantee & Trust Company and the defendant Mortgage Guarantee Company, for value, indorsed, transferred, and delivered to the plaintiffs in this action 73 of the said promissory notes, and that plaintiffs ever since have been, and still are, the owners and entitled to the possession of said notes, and which facts were at all times in the complaint mentioned known by the defendants Title Guarantee & Trust Company, Mortgage Guarantee & Trust Company, and American Mortgage Company of California.

That on November 22, 1926, the said defendants Gilman executed to American Mortgage Company their promissory note for $60,000, due on or about three years from date thereafter, and bearing interest at 8 per cent. per annum, and contemporaneously with the execution of said note, and as and for security for its payment, the said Gilmans executed a deed of trust to defendant Title Guarantee & Trust Company, as trustee, and to defendant American Mortgage Company, as beneficiary, upon the same property, and which said trust deed was recorded in the office of the said recorder on November 22, 1926, in book 6461, at page 205 of said records.

That thereafter said Title Guarantee & Trust Company, as trustee under said last-mentioned deed of trust, after notice and sale by said defendant, pursuant to the terms thereof, executed in writing its trustee's deed of said real property to defendant American Mortgage Company, all of which acts were unknown to plaintiffs, or any of them, and were known to defendants, and each of them.

That thereafter defendant American Mortgage Company executed its deed of said real property to defendant American Mortgage Company of California, the successors in interest of defendant American Mortgage Company, which defendant American Mortgage Company of California succeeded to the properties and interest of defendant American Mortgage Company with full and complete knowledge of all transactions had and conveyances executed as thereinabove in said complaint stated.

That said transfer was known to defendants, and each of them, and unknown to plaintiffs, or any of them.

There are also allegations that subsequent transactions set forth in the complaint were made without consideration, fraudulent, and invalid; that there was no agreement or contract between plaintiffs and defendants Title Guarantee & Trust Company or American Mortgage Company, with respect to the execution or making of any of said instruments; that there was not any consideration at any time for the making or execution of the said subsequent instruments set forth in the complaint; and that the said instruments were wholly without consideration, fraudulent, and void.

It is also alleged that particularly the described reconveyance is an obstruction and hindrance to, and a cloud upon, the title and first lien of plaintiffs herein.

In view of the position which we take in the matter, a specific statement of further allegations in the complaint, except as herein particularly stated, are deemed unnecessary.

[1, 2] It is to be noted that the two trust deeds mentioned were executed the same day, but that the one executed by the Gilmans for $60,000, as security for the payment of the said amount, was recorded on November 22, 1926, in book 6461, at page 205 of the said records, while the trust deed given to secure the payment of the notes held by plaintiffs was recorded on November 23, 1926, in book 6545, page 8 of said records, but that no time of the day of the filing of said two trust deeds is set forth or alleged in the complaint. The $60,000 trust deed being recorded in book 6461, at page 205, and the trust deed under which plaintiffs claim, being recorded in book 6545 at page 8 of said records, under such circumstances we are compelled to assume that the $60,000 trust deed was filed for record prior to that of the one under which plaintiffs claim. These circumstances, together with the allegation that said Title Guarantee & Trust Company, as trustee under the $60,000 deed of trust, and after notice and sale by defendant pursuant to the terms thereof, executed in writing its trustee's deed of said real property to defendant American Mortgage Company, all of which acts were unknown to plaintiffs and each of them, render ineffective the allegations that said acts were unknown to plaintiffs, or any of them. Otherwise, recordation and the giving of notice would be idle acts.

There is a further allegation that on April 7, 1931, action was commenced in the United States District Court in and for the Southern District of California, and in said proceeding, at different times, A. D. McLeod and Frank C. Mortimer were appointed receiver and coreceiver, respectively, of said defendant American Mortgage Company of California, both of which receivers duly qualified, and that the said District Court authorized the commencement of this action on the part of the plaintiffs herein.

[3, 4] The complaint contains many allegations of fraud, knowledge of and want of consideration for the transactions mentioned therein, and of which complaint is made, but, in view of the specific allegations set forth, we are of the opinion that such allegations are only conclusions of the pleader. The recordation of the $60,000 trust deed prior to that under which plaintiffs claim, of course, imparts to them notice. The further allegation that after notice of sale and sale under said $60,000 trust deed, the allegations that the transactions were unknown to plaintiffs are nothing more than statements of conclusions. It is thoroughly settled as the law of this state that where relief is sought under a claim of fraud, deceit, or concealment, these matters and the facts constituting them must be specifically alleged, therefore, we deem citation of authorities unnecessary. Herein the complaint does not attempt to set forth specifically facts of fraud or concealment, or other such matters, as a result of which plaintiffs were precluded from receiving the constructive notice available to them in the records of said county, and of the notice of sale under said $60,000 trust deed.

We therefore conclude that the complaint, on its face, fails to establish a cause of action for any relief sought, and that, after at least four attempts to state a cause of action, the trial court was correct in sustaining the demurrer without leave to amend.

It is therefore ordered that the judgment be and the same is hereby affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

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9 Cal.App.2d 280

DOROTHY v. DRAPEAU, Building and Loan Com'r.

Civ. 10040.

District Court of Appeal, Second District, Division 2, California.

Sept. 25, 1935.

Hearing Denied by Supreme Court Nov. 22, 1935.

1. Mandamus 🔑187(9)

On appeal from judgment denying writ of mandate to compel reinstatement of petitioner under Civil Service Act to position in office of building and loan commissioner, reviewing court could not try de novo question of commissioner's good faith in laying off petitioner (St. 1913, p. 1035, as amended).

2. Mandamus 🔑168(4)

In proceeding to compel reinstatement of supervising clerk under Civil Service Act to his position in office of building and loan commissioner, evidence sustained finding that commissioner acted in good faith in laying off clerk (St. 1913, p. 1035, as amended).

3. Stipulations 🔑18(6)

Excluding evidence which was contrary to stipulation of parties *held* not error.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Petition by Roy Dorothy for a writ of mandate against Louis Drapeau, State Building and Loan Commissioner. From a judgment denying a writ of mandate, petitioner appeals.

Affirmed.

Fontaine Johnson and Wilmer W. Morse, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen. (Thomas M. Gannon, of San Francisco, of counsel), for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment which denied a writ of mandate in a proceeding brought to compel the reinstatement of the petitioner under the State Civil Service Act (St. 1913, p. 1035, as amended) to his position in the office of the building and loan commissioner and to compel the payment of the salary incident thereto.

[1,2] Among the circumstances which resulted in the layoff of petitioner were the following: About the 1st of January, 1931, the so-called Beesmeyer defalcation was discovered in Los Angeles. The collapse of the Guaranty Building & Loan Association soon followed. Our nation at that time was suffering from one of its worst depressions. When news of the Beesmeyer defalcation reached the public, the work of the division of building and loan supervision grew by leaps and bounds. For the purpose of restoring public confidence in the department, Hon. H. L. Carnahan was prevailed upon to assume the office of building and loan commissioner until the crisis was over. The office force was necessarily greatly increased. The climax came during the months of August, September, and October of 1931, at which time the division had the largest number of employees that it has had in its history. Thereafter the work of the division decreased. Upon the resignation of Mr. Carnahan in January, 1932, former Governor Friend W. Richardson succeeded to the office of building and loan commissioner. In the interest of economy former Governor Richardson decreased the number of employees and continued to so decrease the number until at the time of the petitioner's layoff there were only 36 employees. Prior to the time that Mr. Carnahan took over the office of building and loan commissioner, the head office of the division had been maintained in San Francisco. When he took over the office, a great deal of the work being in Southern California, he made the Los Angeles office the head office: When former Governor Richardson took over the work, he moved the head office back to San Francisco. Petitioner remained with the branch office at Los Angeles. He was laid off some time thereafter. These circumstances are important, for the reason that at the trial the case resolved itself into a question of the good faith of former Governor

Richardson in laying off the petitioner; and a number of the duties, which petitioner claims it was his custom to perform in the Los Angeles office and which he claims were taken away from him, were matters which, by the very nature of things, would be handled through the head office.

The petitioner admits that, "if the appellant were laid off from the position to which he was certified and appointed, and in which he had served the required probationary period, because no duties for which he was qualified to perform remained, such fact would be a sufficient answer to any attempt by him to be reinstated, and his position would be lawfully abolished. * * * However, such layoff by the appointing power must be done in good faith." Petitioner seeks on appeal to try de novo this question of former Governor Richardson's good faith, which, of course, we cannot do. It is sufficient to say that the trial court found that former Governor Richardson acted in good faith and that there is substantial evidence to sustain the finding.

[3] Petitioner in his next contention makes numerous specifications of error relative to the rulings of the trial court on the admission and rejection of evidence. The first of these relates to the rulings of the trial court in refusing to allow petitioner to testify and in refusing to admit other evidence offered by petitioner as to the duties of certain employees whose names appeared in a stipulation in the file to the effect that said employees had not assumed any of the duties of petitioner. The matter concerning which petitioner sought to adduce testimony had already been stipulated to by the parties, and it was not error for the trial court to exclude evidence which would be contrary to the stipulation. We have examined all of the alleged errors with regard to the rulings on the evidence, and we find no error in such rulings which would entitle the petitioner to a new trial.

Petitioner next contends that the findings are not supported by the evidence. Some of the exceptions pointed out by the appellant relate to typographical, and some to clerical errors, while others relate to matters as to which there is a substantial conflict in the evidence. There is no merit in this contention.

It is the final contention of the petitioner that the trial court failed to find upon material issues upon which evidence was introduced. We find no merit in this contention. The findings follow the theory of the respondent that petitioner was a supervising clerk and that, at the time of his layoff no sufficient substantial duties being left to be performed by him his layoff was proper.

Judgment affirmed.

I concur: FRICKE, Justice pro tem.

I concur in the judgment: WOOD, J.

PEOPLE v. BYERS.*

Cr. 287.

District Court of Appeal, Fourth District, California.

Sept. 23, 1935.

Hearing Granted by Supreme Court Oct. 17, 1935.

1. Municipal corporations 🔑156

Where city charter did not affirmatively provide that no money should come into city attorney's hands and authorized him to handle legal work of city, funds received by him for purpose of paying expenses of his official trips *held* received by him under color of his office, and hence his failure to account therefor and his making false reports as to expenditure of such money constituted misconduct in office (Pen. Code, §§ 758–771).

2. Municipal corporations 🔑159(1)

In proceeding against city attorney accused of misconduct in office, whether other city officers had authority to advance expense moneys for official trips of city attorney who allegedly misappropriated them *held* immaterial, since city attorney's failure to account therefor constituted misconduct in office, regardless of blame of other officials (Pen. Code, §§ 758–771).

3. Municipal corporations 🔑159(6)

Appeal of city attorney who was removed from office for misappropriation of city funds was not limited to question of whether charter authorized attorney to receive money, but charter provision that officer willfully approving any demand on treasurer not authorized by law shall forfeit his office could be considered (Pen. Code, §§ 758–771).

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 55 P.2d 1177.

4. Municipal corporations ⚷159(6)

In proceeding against city attorney for misconduct in office, for which only punishment was removal from office, admission of evidence that city attorney refused to answer certain questions propounded to him before grand jury on ground that to answer might incriminate him *held* not reversible error, where his entire testimony before grand jury was read, and city attorney who had not taken stand objected only to jury being informed of his refusal to answer certain questions (Pen. Code, §§ 758–771; Const. art. 1, § 13, as amended).

5. Municipal corporations ⚷159(1)

In proceeding to remove city attorney, evidence *held* sufficient to sustain conviction of city attorney of misconduct in office through misappropriation of city funds (Pen. Code, §§ 758–771).

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

C. L. Byers was found guilty of misconduct in public office, and, from a judgment removing him from office, he appeals.

Affirmed.

See, also, In re Byers, 49 P.(2d) 350.

Dempster McKee, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and John T. Holt, Deputy Dist. Atty., both of San Diego, for the People.

BARNARD, Presiding Justice.

The defendant, who is city attorney of the city of San Diego, was charged under sections 758 to 771, inclusive, of the Penal Code, with willful and corrupt misconduct in office, and, after trial by a jury, was convicted on eight counts of the charge. These counts relate to various charges of misappropriating city funds drawn by him for the purpose of paying expenses of trips taken on official business connected with his office as city attorney, and making false reports as to his expenditure of such moneys. From a judgment removing him from the office of city attorney of said city, the defendant has appealed.

The purchasing department of the city of San Diego maintained a revolving fund from which the appellant had been in the habit of drawing expense money for trips up to the amount of $25, and later filing accounts with the purchasing agent showing the disposition of moneys thus advanced. On August 11, 1933, he signed and presented to the city auditor a claim for $25, setting forth that it was for the expenses of himself, the city treasurer, and two police officers on a trip to Los Angeles on August 12 "to obtain R. F. C. cash." The claim was sworn to in the usual manner, reciting that it was correct and legal, that the items contained therein were furnished to the city, and that the amount was due. A warrant for that amount was issued to him, which he cashed that day at the city treasurer's office. The next day the appellant, the city treasurer, and the two police officers went to Los Angeles in a police car belonging to the city of San Diego for the purpose of delivering certain bonds to a federal reserve bank in furtherance of city business. That night the appellant and the city treasurer stayed at the Alexandria Hotel. It appears that the appellant did not buy any gasoline or oil on the trip to Los Angeles; that he did not pay the hotel bill for himself or the city treasurer; that he did not pay for certain meals eaten by the treasurer and the two officers in the course of the trip; and that he did not give any moneys to the city treasurer or to the two officers for the purpose of paying any expense incurred by them. He did not inform any of the other parties that he had city funds with which to pay the expenses of the trip, and the city treasurer testified that, when they left the hotel, the appellant told him that it would be convenient for him if the treasurer would pay the bill. The treasurer paid the bill for both of them, and was not reimbursed by the appellant. After returning to San Diego, the treasurer put in a claim to the city and was paid the sum of $17 to reimburse him for the expenses thus paid by them. No return or accounting was ever made by the appellant as to what was done with the $25 advanced for the expenses of this trip.

On October 30, 1933, an ordinance was passed by the council of San Diego appropriating $2,500 from the El Capitan dam bond fund for the purpose of providing funds to pay certain costs in connection with the application of the city to the United States for a grant to complete the El Capitan dam project; it being provided that its purpose was only and exclusively to provide funds to pay legal, engineering, and sustenance expenses of the city and its attorney. On November 6 and November 8, 1933, upon sworn claims, the appellant received and cashed two warrants, receiving a total of $1,600 from the funds so appropriated. On November 17, 22, 23, and 24, 1933, the appellant signed certain checks and slips at the Alexandria Hotel in Los Angeles. His hotel bill at the hotel on that trip was $116.28, and he left the hotel on November 25, 1933, without paying any part thereof. He returned to Los Angeles on December 1, 1933, going to a different hotel. While he was in Los Angeles most of December, 1933, and part of January, 1934, he did not communicate with the Alexandria Hotel or pay that bill. Many statements sent to him during 1933 and 1934 by that hotel were not answered. On September 4, 1934, he answered one of their letters, stating that he did not know who was entitled to receive the money. The bill was placed in the hands of an attorney, and the appellant informed this attorney that the bill was due and should have been paid a long time ago, but that he had been hard-pressed financially and would take care of it on October 5, 1934. He paid $50 on the account on or about October 1, 1934, and later an action was brought, judgment by default was entered, and the balance was finally obtained by levying execution against his salary. In the meantime, on May 3, 1934, the appellant filed an accounting with the city auditor as to the $1,600 received by him, setting forth various expenses incurred, including the charges of the Alexandria Hotel on November 17, 22, 23, 24, 1933, and returning the balance of the amount received.

In this account filed on May 3, 1934, the appellant included as expenses certain items for meals and hotel on December 20 and 21, 1933, totaling $24.40 and other items for hotel, meals, and telephone on December 28 and 29, 1933, to the amount of $17.15. It appears from the evidence that bills for these amounts were incurred by him on those dates at the Biltmore Hotel in Los Angeles; that he left that hotel on December 31, 1933, without paying any of said charges; that a number of letters written to him by the hotel were not answered; and that the bill was not paid until August 14, 1934, some months after the accounting was filed with the city.

On November 28, 1933, the appellant received $22 from the purchasing agent of San Diego to cover the expense of a trip to Los Angeles. On December 11, 1933, he received $4.56 from this department purportedly covering the balance of his expenses on that trip. An itemized account covering these expenses was filed on December 11, 1933. In his accounting for the $1,600 received, which he filed on May 3, 1934, the appellant again included and received credit for the same items, exact in date and amount, which had been turned in to the purchasing department in his accounting of December 11, 1933; the duplication amounting to $26.56.

On January 28, 1935, the appellant appeared before the grand jury of San Diego, at its request, and gave certain testimony. In the beginning he stated that he was willing to and would answer any questions relating to the conduct of his office in connection with city affairs, but that he refused to answer any questions relating to his personal affairs on the constitutional ground that to answer such questions might tend to degrade or incriminate him. He testified that he had known that he was to be called before the grand jury to be questioned with regard to his expense accounts, and that, at his request, his chief deputy had made an examination of his accounts and compared his records with those of other city officers. He admitted that there was a duplication in the accounts as to the $26.56, which he said he could not explain, and also admitted that he had never filed an account for the $25 received by him on or about August 11, 1933. He also stated that on that morning, before coming before the grand jury, he had repaid to the city the sum of $25 and $26.56, paying the same out of his personal moneys. While he refused to answer many questions on the constitutional ground referred to, an inference may fairly be drawn from his statements to the grand jury that he was without funds during at least a part of the time material here, if, in fact, there is not a direct admission to this effect. At the trial of the action the appellant did not take the stand.

[1] The first point raised is that it was no part of the official duties of the appellant, as city attorney, to possess or disburse any city funds, that any possession

of city funds on his part was necessarily outside the scope of his official duties, and therefore that anything he might do with relation to city moneys which were actually in his possession could not constitute misconduct in office. Cases are cited on the proposition that the conduct of an officer which is outside the scope of his official duties, even though criminal in nature, will not constitute misconduct in office, and many cases are cited from this and other jurisdictions in actions on official bonds where it has been held that the particular act in question is not within the contemplation of the bondsmen in assuming liability for the official acts of the officer. It is argued that in no case has it been held that misappropriation of money by an officer is within the line of his official duties, unless under a strict interpretation of the law he was authorized to receive the money, and that no such authorization here appears. Some very technical rules have been applied in some such cases in favor of bondsmen on official bonds. While some jurisdictions have followed the rule that the surety in such a case is liable only for the acts of his principal virtute officii, the rule in this state seems to be established that such a surety is liable for the acts of his principal colore officii. Abbott v. Cooper, 218 Cal. 425, 23 P.(2d) 1027. It should also be kept in mind that the problem here is somewhat different from that presented in the line of cases referred to, where the rights of third party sureties were involved.

[2, 3] The appellant insists that the city charter of San Diego makes no provision for any funds coming into the hands of the city attorney. While this is true, the charter does not affirmatively provide that no money shall come into the hands of the city attorney and it does authorize and direct that officer to handle the legal work of the city. There can be no question that the work upon which the appellant was engaged at the times here in question was well within the line of his official duties. If in carrying out such duties city funds came into his hands in connection therewith and as a part thereof, we should hesitate to hold that such money was not received and held by him under color of his office or that any failure to properly account for the same would not constitute misconduct of his office. In this connection it should be kept in mind that this is a special proceeding, and, while it is in the general nature of a criminal action, it does not follow that a public officer, so accused, is entitled to every technical defense known to the criminal law or available to a bondsman under a definite contract. The only punishment provided is removal from office. A high standard should be and is required of public officers in the conduct of their duties, and many things may constitute misconduct in office which might not be sufficient to meet more severe requirements in other matters. There can be no question that the appellant received this money because he was city attorney and for the direct purpose of enabling him to perform certain services for the city as such officer. Whether or not other officers of the city had authority to advance expense money to him, the trips were a part of the appellant's official duty, and, having funds in his possession which he knew to be city funds and which he had obtained through his official position and solely for the purpose of paying the expenses of such trips, it became his duty to account for them, and a failure to do so is none the less misconduct in office if, in fact, other officers of the city are not free from blame. Another consideration is that section 108 of the city charter provides that any officer who shall willfully approve any demand on the treasurer not authorized by law shall forfeit his office. If it be held that the advance of this money to the appellant was unauthorized by law, the fact remains that, under oath, he approved the claims and enabled the money to be drawn from the city treasury. The appellant argues that this phase of the matter is not within the charge made and cannot be considered. The appellant was charged with misconduct in office through misappropriation of city funds in his hands, and we are unable to see why, as argued, this appeal must be limited to the question of whether or not the charter authorized the appellant to receive the money.

[4] The appellant's second point is thus stated by him: "In admitting over objection evidence that the accused refused to answer certain questions propounded to him by a deputy district attorney at a meeting of the grand jury, on the ground that to answer might tend to degrade and incriminate him, the court permitted reversible error." It is argued that the admission of such evidence was error, in that it compelled the appellant to be a witness against himself and deprived him

of his constitutional privilege not to answer questions. While it seems to be conceded that the statements which were made by the appellant to the grand jury were voluntarily made, it is argued that the particular portions objected to, that is, the refusal to answer certain questions on the ground named, could not be considered as voluntary statements and were not admissible.

While the introduction into evidence in a criminal case of testimony given by a defendant before a grand jury has been often questioned and under some circumstances held to be error, other cases indicate it may be admitted as an admission when voluntarily given at a time when no formal charge is pending and when a defendant is represented by counsel or otherwise is cognizant of his rights. People v. Young, 31 Cal. 563; People v. Sexton, 132 Cal. 37, 64 P. 107; People v. O'Bryan, 165 Cal. 55, 130 P. 1042. If such evidence is ever admissible, it should be in such a case as this which, while criminal in nature, is a special proceeding designed to protect the government itself by securing faithful performance of their duties by its officers and servants, and this is especially true where, as here, the person accused is an able lawyer fully cognizant of his legal rights, who has voluntarily appeared and made such statements as he considered favorable to himself.

When the transcript of the appellant's testimony before the grand jury was offered in evidence, his counsel started to object without stating the grounds of his objection and then suggested that the prosecuting attorney "offer the questions and answers." The court suggested that the testimony be read to the jury instead of giving them the transcript and that the appellant's counsel interpose such objections as he had. Thereupon the statements made by the appellant to the grand jury were read to the jury and no objection was made except at those points where questions were asked and where the appellant refused to answer on the ground that the answer might tend to degrade or incriminate him. Such refusal to answer occurred some twenty-three times in the transcript of this testimony, and in each instance, as the reader came to that point, an objection was made to that particular part only. These objections were all overruled. The appellant did not take the stand at the trial, and it is perfectly apparent that he himself desired to have the statements he had made read to the jury, and that he objected only to the jury being informed of his refusal to answer other questions on the ground named. Under such circumstances, where the appellant, with full knowledge as to his legal rights, voluntarily undertook to make certain statements to the grand jury and voluntarily permitted this part of the record to be read to the jury, we think it was not prejudicial error to admit the entire record and that the appellant was not entitled to claim immunity as to parts thereof while acquiescing in the admission of other portions more favorable to himself. This is particularly true in an action of this nature, involving the good faith of a public official in the performance of his duties, and we think that such an official should not under such circumstances be allowed, without taking the stand, to secure the benefit of such parts of a voluntary statement as he considered favorable and to object to other portions thereof in which he refused to explain matters suggested by his own statements and which obviously called for an explanation.

The appellant argues that the only purpose in reading his testimony before the grand jury was to prejudice him by getting before the jury the fact that he had declined to answer certain questions. The transcript thus read to the jury contains statements made by the appellant which were material to the matter in issue. Among other things, the appellant stated to the grand jury that he would try to answer all questions relating to city affairs having to do with his official position; that he drew $25 on or about August 11, 1933, for a trip to Los Angeles on August 12; that he presumed one of the police officers paid for the gasoline used on the trip to Los Angeles; that he could not remember whether he had paid for any meals; that he could not remember who paid the hotel bill; that the city treasurer paid the hotel bill on one trip but he did not remember which one; that he did not repay the treasurer this amount; that either on this trip or another trip the city treasurer paid for some meals; that on this particular trip he did not pay any of the expenses of the treasurer or the two officers; that he presumed he had paid his own way back but could not remember; that he had the $25 with him while on the trip; that he could not remember why he did not pay his or the treasurer's hotel bill; that he could not recall whether or not he was in financial difficulties at that time but that he did not have any bank account; that he drew the $25 in advance for the purpose of having funds for that trip; that it is possible that there may have been times since that day when he had no money and had to borrow some; that he repaid the $25 to the city that morning before coming before the grand jury because he had discovered it had never been accounted for; that he had contemplated being before the grand jury for a number of days; that he turned in another $26.56 that morning; that there was a duplication as to this which he could not explain; that he repaid these amounts out of his personal money; that when he drew $26.56 in November, 1933, and put in an account for that amount for expenses of November 30, December 1, and December 2, 1933, he had the $1,600 in his pocket which he had drawn for expenses for that sort of trip; that he was unable to explain this; and that, when he made his accounting in May, 1934, he knew he had not paid the hotel bills in Los Angeles. He refused to answer a question as to where the $1,600, was at the time he drew the additional $26.56, refused to answer a question as to whether he had not used the greater part of the $1,600 for personal affairs at that time, refused to answer a question as to whether he did not have to borrow money at one time to make up a part of the $1,600 in order to make a trip; and, when asked if he had used any part of the $1,600 for any of his personal affairs, he replied: "The money was received lawfully and in my possession, the expenses were paid and the balance turned into the city and every penny of the balance turned into the city and every penny of the $1,600 accounted for. Beyond that, I will refuse to answer."

Under the circumstances of this case we are unable to hold that the admission of evidence of appellant's refusal to answer certain questions before the grand jury was reversible error. Under the recent amendment to the Constitution (article 1, § 13), even in a criminal case, the refusal of a defendant to explain evidence against him may be considered by the jury. The jury had the right to consider the fact that the appellant did not take the stand or explain the evidence against him, and it is difficult to see how the fact that he had previously refused to explain could be much more prejudicial.

[5] It is finally urged that the evidence is insufficient to sustain the verdict and judgment. In this connection it is argued that, at best, the evidence merely shows that certain expenses incurred were not paid, but fails to show what was actually done with the money; that, although the money drawn was not used for particular expenses shown, it may have been otherwise spent for the benefit of the city; that, while certain hotel bills were not paid, the appellant may, at the same time, have had rooms in other hotels, paying for the same with the city money; that in any event he may have had the money at all times available and ready to return; that no demand was made upon him for the return of the money; and that any actual shortages were later paid.

The repayment of certain moneys many months later is not in itself a sufficient answer to such a charge, even though such payments preceded a demand therefor. The jury was not required to draw the other inferences suggested, and the evidence, a portion of which has been herein summarized, is the best answer to the rest of these contentions. In our opinion, the evidence discloses a situation inconsistent with proper conduct in such an office and entirely sufficient to constitute misconduct therein within the meaning of the statutes. In the absence of any adequate explanation, we think the evidence, including the statements and admissions of the appellant which were admitted without objection, is, with the inferences which the jury might reasonably draw therefrom, amply sufficient to sustain the verdict and judgment.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

In re BYERS.

Cr. 286.

District Court of Appeal, Fourth District, California.

Sept. 23, 1935.

Appeal and error ⇨482

Temporary order by court of appeal staying execution of judgment until hearing on application for stay was vacated when judgment was affirmed.

Proceeding by C. L. Byers for stay of execution of judgment of conviction pending appeal. A temporary order staying execution was issued.

Order vacated.

Dempster McKee, of San Diego, for petitioner.

BARNARD, Presiding Justice.

This proceeding relates to the appeal in People v. Byers (Cal. App.) 49 P.(2d) 344. After an appeal was taken in that case, but before it was perfected, this application was filed seeking a stay of execution of the judgment during the pendency of the appeal. A temporary order was issued staying execution of the judgment until a hearing and decision on the application and until the further order of this court. Without formal hearing, the matter was continued and submitted with the appeal in People v. Byers. An opinion having been filed therein, the order staying execution issued herein is hereby vacated, set aside, and discharged.

We concur: MARKS, J.; JENNINGS, J.

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9 Cal.App.2d 262

SHERMAN v. BOARD OF TRUSTEES OF SISKIYOU UNION HIGH SCHOOL DIST. et al.

Civ. 5373.

District Court of Appeal, Third District, California.

Sept. 24, 1935.

1. Schools and school districts ⇨139

Where teacher, after teaching successfully for three consecutive years, resigned, to avoid effect of Teachers' Tenure Law, on superintendent's request, and on his definite promise that she would be re-employed, and at least one member of board had knowledge of conversation between superintendent and teacher, and she was re-employed and served for three further successive school years, teacher *held* entitled to status as permanent teacher, the purported resignation being ineffectual (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

2. Schools and school districts ⇨139

Teacher's "resignation" is in nature of termination of contract of employment, is contractual in nature, and is ineffectual without intent of incumbent to sever relationship of employer and employee.

[Ed. Note.—For other definitions of "Resignation," see Words & Phrases.]

3. Schools and school districts ⇨139

Under Political Code, teacher who, when her resignation for purpose of avoiding effect of tenure law was accepted by board on June 5, 1931, had served successfully as teacher in same school for three consecutive years, *held* entitled to status as permanent teacher, regardless of effect of her reappointment purportedly as a probationary teacher for ensuing year (Pol. Code, § 1609, as amended by St. 1927, p. 1913).

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Mandamus proceeding by Helen N. Sherman against the Board of Trustees of the Siskiyou Union High School District and others. From a judgment denying the writ, petitioner appeals.

Reversed, with directions.

James A. Nutting, of Sacramento, for appellant.

Charles E. Johnson, Dist. Atty., of Yreka, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment denying a petition for a writ of mandamus to require the trustees of Siskiyou Union High School district to reinstate the petitioner as a permanent teacher therein on the ground that she has acquired such status under the Teachers' Tenure Act by having successfully served as a teacher for more than three consecutive school years. The district has a daily attendance in excess of 850 pupils. The petitioner was regularly employed as a teacher in the district in 1928 and served as such continuously for three consecutive school years. It was conceded that she was one of the best teachers the district had. The members of the board were unanimously opposed to the policy of the Teachers' Tenure Act, and therefore knowingly reemployed no teachers for more than three consecutive school years so as to permit them to attain tenure.

Mr. A. G. Grant was superintendent of the school district and secretary of the board. He investigated the qualifications of all candidates for application to teach in the school, and his recommendations for appointments were usually accepted. At the close of petitioner's employment for the third consecutive school year, Mr. Grant asked if she desired to be reappointed and she replied that she did so desire. In response to this request he wrote her a letter dated May 24, 1931, reading in part:

"I find just one fly in the ointment and that is the question of tenure. Members of the high school board have expressed themselves as opposed to placing any more teachers under tenure and the board passed a resolution by unanimous vote, with all members present, memorializing our representatives in the Legislature to repeal the tenure law.

"The new tenure law will not go into effect until August and specifically provides that all teachers under tenure at the time that it does go into effect shall retain their tenure so the only way out that I can see would be for you to tender your resignation and let it be accepted at the next regular meeting of the board prior to June 10, because if you were reemployed for a fourth year you would become a permanent teacher under the existing tenure law and unless you resign, even failure on the part of the board to notify you by June 10 that your services will not be required for the ensuing year, would amount to reemployment.

"When your resignation is accepted, you will be entirely free to accept employment elsewhere and the board will be entirely free to employ some one in your place. If no one were employed in your place before the new law goes into effect, then I think that the board could select you as well as any one of other applicants that might be candidates for the position and not be compelled to give you the status or classification of a permanent teacher.

"* * * I would suggest that you file your resignation because in any event it would be better to have the records show the acceptance of your resignation than to have them show refusal to reemploy you even though the reason might be the tenure law."

The petitioner testified that she had a subsequent oral conference with Mr. Grant, at which he positively assured her that, if she filed the formal resignation, she would be re-employed. Being anxious to retain her position, the petitioner consented to this procedure and signed a printed form of resignation prepared and furnished by the board through Mr. Grant. This purported resignation was to take effect only after the termination of her third consecutive school year. It was promptly accepted by the board and she was notified of their action on June 5th. August 16th her application for reappointment was presented to the board and on the 24th of that month at a regular meeting of the board a minute order was adopted purporting to re-employ her for the following year as a probationary teacher. She continued to teach in the school for three further consecutive school years, at the end of which time, for the purpose of preventing her from attaining tenure, she was notified that her services were no longer required. A petition for a writ of mandamus was then filed in the superior court of Siskiyou county, seeking to have the court determine that she had acquired permanent tenure and reinstating her as a teacher in the school. The trial court found "that there was no collusion or understanding between the petitioner and the Board of Trustees or any of the members thereof, that said petitioner, if she would resign as teacher in said district at the end of the school year 1930–1931, or at any other time, would be reemployed as a teacher in said District." Thereupon judgment was rendered, denying the petition for a writ. From that judgment the petitioner has appealed.

[1, 2] It appears without conflict of evidence that the petitioner successfully served as a teacher in the Siskiyou Union High School District continuously for six full successive school years, unless the purported resignation be deemed to have broken the continuity of her contract, and that she would therefore be entitled to be reinstated under the provisions of section 1609 of the Political Code as it then stood (as

amended by St. 1927, p. 1913), now section 5.500 of the School Code, as a permanent teacher of the school. We are of the opinion that, the petitioner having successfully served under contract as teacher for three full successive school years, and having been reappointed as a teacher in the same school, she automatically attained the status of a permanent teacher therein (Gastineau v. Meyer, 131 Cal. App. 611, 22 P.(2d) 31), and that the writ of mandamus should issue directing the board to reinstate her and classify her as such permanent teacher therein.

The purported resignation was ineffectual, for the reason that it was not made with the purpose of terminating the petitioner's employment, but, on the contrary, was presented with the understanding that it was not to terminate her service, but was offered for the mere purpose of avoiding the effect of the tenure law and upon the definite promise that she would be re-employed. The resignation was procured in that manner by the assurance of Mr. Grant that she would be re-employed. At least one member of the board, Mr. Kaupp, testified that he had knowledge of this conversation between the petitioner and Mr. Grant in which she was promised re-employment. A resignation is in the nature of a notice of the termination of a contract of employment and is contractual in its nature. It is ineffectual without the intent of the incumbent to sever the relationship of employer and employee. Fryer v. Norton, 67 N. J. Law, 23, 50 A. 661. Section 5.500 of the School Code (as added by St. 1931, p. 1394, § 4) provides: "Every employee of a school district of any type or class, who after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district."

[3] Under the provisions of section 1609 of the Political Code as it existed at the time of the expiration of the third consecutive year of the petitioner's employment, she was automatically entitled to the status of a permanent teacher, regardless of the effect of her reappointment. Gastineau v. Meyer, 131 Cal. App. 611, 22 P. (2d) 31; Briney v. Santa Ana School District, 131 Cal. App. 357, 21 P.(2d) 610; La Shells v. Hench, 98 Cal. App. 6, 276 P. 377; Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713; Owens v. Board, 68 Cal. App. 403, 229 P. 881. Since the petitioner's resignation was ineffectual, she was entitled under the preceding authorities to be classified as a permanent teacher. Moreover, having been re-employed for the fourth consecutive school year and having successfully served as a teacher for six successive school years under the provisions of section 5.500 of the School Code, she was entitled to classification as a permanent teacher.

Even though it be deemed that the members of the board did not deliberately procure her purported resignation for the purpose of avoiding the tenure law, one of the members of the board having full knowledge of the promise of reinstatement made by Mr. Grant and having immediately followed his recommendation by reappointing her, we must assume that the board at least acquiesced in the purpose and the promise of reinstatement by means of which her resignation was procured. This would amount to a circumvention of the purpose of the law, and the status of a permanent teacher may not be thus denied.

The judgment is reversed and the trial court is directed to issue a writ of mandamus directing the board of trustees of Siskiyou Union High School district to reinstate the petitioner and classify her as a permanent teacher of the Siskiyou Union High School.

We concur: **PULLEN, P. J.; PLUMMER, J.**

4 Cal.2d 356

McCLURE v. McCLURE.

S. F. 15370.

Supreme Court of California.

Sept. 25, 1935.

Rehearing Denied Oct. 24, 1935.

1. **Divorce** 🔑255

Divorce decree may be rendered which permanently relieves husband from obligation to pay alimony, decree having such effect where it expressly so provides, or where it neither awards alimony to wife nor reserves right thereafter to make allowance for her support.

2. **Divorce** 🔑245(1)

Where divorce decree awarded alimony for wife's support, subsequent order of court permanently relieving husband of obligation to contribute to former wife's support *held* justified by power granted to court to modify alimony allowances (Civ. Code, § 139).

3. Divorce 🔑245(1)

Power to terminate liability for alimony by way of modification of divorce decree exists, but should be exercised by courts with caution, and only after full consideration of circumstances of parties (Civ. Code, § 139).

4. Divorce 🔑245(1), 246

Remedy for wife who is dissatisfied with order of court permanently terminating obligation of husband to pay alimony is by appeal from decree, by motion under statute, or by suit in equity if decree of modification was procured by fraud or other grounds of equitable attack are present (Code Civ. Proc. § 473).

5. Divorce 🔑245(4)

Under statute, court may make orders for support of former wife, subject to modification, but order releasing husband permanently from liability for alimony is not subject to modification (Civ. Code, § 139).

6. Divorce 🔑245(3)

In hearing on application for restoration of wife's alimony, objection to question which would have elicited information as to whether plaintiff had remarried after her divorce *held* improperly sustained, since remarriage of wife would be defense to her obtaining alimony (Civ. Code, § 139, as amended by St. 1933, p. 1039).

7. Divorce 🔑288

Where order permanently relieved husband from alimony obligation, court was precluded from allowing costs and attorney's fees to be paid wife if husband prosecuted appeal from subsequent order reinstating wife's alimony.

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In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Suit by Vashta McClure against Richard Alfred McClure. From an order awarding the plaintiff alimony and an order allowing costs and counsel fees, the defendant appeals.

Orders reversed.

Treat & Ogden, of San Francisco, for appellant.

Joseph J. Webb, of San Francisco, for respondent.

SEAWELL, Justice.

By interlocutory and final decrees of divorce the superior court of Marin county awarded plaintiff, Vashta McClure, alimony in the sum of $100 a month. Thereafter, on March 4, 1927, almost four years and a half after entry of the final decree, said court modified the provision for alimony by relieving defendant, Richard Alfred McClure, from thereafter paying any sum whatever for the support of plaintiff. On October 26, 1934, the court decreed that defendant should pay plaintiff the sum of $30 a month for her support thereafter. Defendant appeals from said order of October 26, and also from an order which allowed plaintiff $50 costs and $150 attorney fees to be paid if defendant prosecuted an appeal from the order of October 26.

The parties were married on June 6, 1919, and separated approximately two years thereafter on July 30, 1921. Defendant was 26 years of age when he married plaintiff, who was then 35. At the time of the marriage defendant was an officer in the United States Army, and he has continued in that profession. No children were born of the marriage. Plaintiff procured the divorce on the ground of extreme cruelty inflicting grievous mental suffering. She alleged no acts of physical violence. Both the interlocutory decree, which was entered on September 30, 1921, and the final decree of October 2, 1922, awarded her alimony in the sum of $100 a month. On March 22, 1926, defendant married his present wife. He continued to pay alimony until February 10, 1927, a period of almost 5½ years, when he moved to modify the decree by eliminating all provision for support of plaintiff. He averred in his supporting affidavit that his salary as a captain in the United States army was $266 a month, which was necessary to support his present wife and a daughter born of their marriage; that he had no other means of support; and that plaintiff was capable of earning her own living. The court granted the modification prayed for.

Upon the hearing held upon her application of 1934 to be restored to alimony, plaintiff testified that she was ill in Washington, D. C., at the time of the modification proceedings in 1927. The order of modification recites that plaintiff appeared by her attorney, Joseph K. Hawkins. In the present proceedings initiated by plaintiff to restore her right to alimony, the judge remarked that to his knowledge at the date of the modification of 1927, attorney Hawkins was ill and away from his office and the courts. It was agreed between the attorneys in the present proceeding that Mr. Martinelli had acted for Mr. Hawkins during his illness, and that he had appeared on behalf of plaintiff in the modification proceedings of 1927. In the present proceeding no attack is made by plaintiff on the validity of the order of 1927. Said final order is valid on its face, and plaintiff did not allege or prove any fraud or other matters of equitable cognizance which would render said order of 1927 subject to equitable attack. Rather, her present motion invoked the power of the court to modify the decree under section 139, Civil Code, and the court viewed the motion in this light.

In directing the defendant to pay $30 a month to plaintiff by its order of October 26, 1934, from which the present appeal is taken, the court acted upon evidence that plaintiff was destitute and dependent on charity. She testified that at the time of her marriage to defendant she was a producer and exhibitor of Alaskan films, for which she received as much as $75 per day. Defendant testified at the hearing in 1934 that he was then earning $400 a month by reason of a special assignment of duty, which would soon terminate, and thereafter he would receive $337 a month. His family consisted of his wife, their daughter, and a daughter of his wife by a predeceased husband. His present wife has poor health and he is indebted for medical bills on her account. It may be said that plaintiff's averment in her affidavit that her ill health was due to violence inflicted upon her by defendant during their marriage is utterly unsupported. A medical examination made during the instant proceeding revealed that she suffered from arthritis in her back, and that she also had a curvature of the spine, which she had had from childhood.

Defendant contends that by reason of the fact that the order of March, 1927, relieved him from thereafter paying alimony to plaintiff in any sum whatever, the court was without right thereafter to order him to contribute to her support. Said order provided that the final decree of divorce be modified by striking therefrom the direction that defendant contribute $100 a month to the support of plaintiff. The order of 1927 continued as follows: "The defendant herein is hereby relieved from the payment to plaintiff herein of any sum whatever for plaintiff's maintenance or support. ~~Until further order of this court.~~" As indicated in our quotation, the words "until further order of this court," by which the court would have reserved expressly the right to restore alimony, were deleted.

[1] It is well settled that a decree of divorce may be rendered which permanently relieves the husband from the obligation to pay alimony in any sum. The decree has this effect where it expressly so provides, or where it neither awards alimony to the wife nor reserves the right thereafter to make an allowance for her support. Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70; London G. & A. Co. v. Industrial Accident Commission, 181 Cal. 460, 184 P. 864; Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 238 P. 93; Molema v. Molema, 103 Cal. App. 79, 283 P. 956; Gillespie v. Andrews, 78 Cal. App. 595, 248 P. 715; note, 83 A. L. R. 1248, citing cases; 71 A. L. R. 723; a different rule prevails as to children of the marriage under section 138, Civil Code, interpreted in Harlan v. Harlan, 154 Cal. 341, 98 P. 32. Section 139, Civil Code, empowers the court in a divorce action to make an allowance to the wife for her support, and to "modify" its orders in this respect from time to time. Where the divorce decree is silent as to alimony, there is no order in respect of the support of the wife to be modified. Cases cited, supra, this paragraph. The divorce decree in such cases is a final determination that the husband shall be permanently free from the obligation to contribute to the support of his former wife.

[2] The instant case presents the question whether the husband may be relieved permanently of the obligation to contribute to the support of his former wife by an order of modification where the divorce decree has awarded alimony for her support. If the court had such power in the instant case, there can be no doubt from a reading of the order of 1927 that it was the purpose and intent of the court thereby to relieve defendant permanently from the obligation thereafter to pay alimony to plaintiff. Not only are the words "until further order of this court," deleted from the order, but, in addition, the court ordered that the provision in the divorce decree for payment of $100 a month to plaintiff be stricken therefrom, thereby evincing an intent that thenceforward plaintiff's rights should be as if the divorce decree

had been silent as to provision for her support. Soule v. Soule, 4 Cal. App. 97, 87 P. 205.

Section 139, Civil Code, confers jurisdiction on the court to modify its orders in respect of the support of the wife to meet changed conditions. It has been held that where circumstances require, the husband may be relieved temporarily from contributing any sum to the support of his former wife by an order of modification made under section 139, Civil Code. Soule v. Soule, 4 Cal. App. 97, 87 P. 205. That the husband may, at the time the divorce is granted, be relieved permanently of the obligation to pay alimony is thoroughly settled by the authorities we have cited above. We are of the view that there is no reason in good policy, nor requirement in section 139, which prohibits the court upon a proper showing from relieving him permanently by order of modification made under the provisions of section 139. We hold that the power granted to the court to "modify" alimony allowances includes a right in proper cases to terminate finally the obligation to pay alimony.

We have found only one case where this precise question has been passed on—Garver v. Garver, 102 Ohio St. 443, 133 N. E. 551. The decision in that case is in accord with our conclusion herein.

[3, 4] It may be conceded that the power to terminate liability for alimony by way of modification under section 139, Civil Code, should be exercised by the courts with caution and only after a full consideration of the circumstances of the parties. But it cannot be said that there are no cases where a permanent termination of alimony liability would be proper. If the wife is dissatisfied with the decree of the court, her remedy is by appeal from the decree or by motion under section 473, Code of Civil Procedure. Or, notwithstanding the time for appeal has elapsed, the divorced wife may bring an action in equity to procure relief if the decree of modification has been procured by fraud, or if other grounds of equitable attack are present. Note, 83 A. L. R. 1249. We have hitherto stated that the order of 1927 is valid on its face. Plaintiff did not attempt to allege nor to prove grounds of equitable attack. More than seven years elapsed without plaintiff taking any steps to attack the order of 1927. Said order recites that she was represented by her attorney. It was stipulated between the attorneys on the present application for restoration of alimony that Mr. Martinelli, acting for Mr. Hawkins, attorney of record for plaintiff, had represented her in the proceedings of 1927. If plaintiff was without funds to prosecute an appeal from the order of 1927, her remedy was to apply to the trial court for an allowance of costs and counsel fees against defendant to prosecute an appeal.

[5] The power on the trial court by section 139, Civil Code, is properly described as a grant of continuing jurisdiction for the reason that the court is empowered under said section to make orders for the support of the wife which shall not be final, but subject to modification. But where the court makes an order releasing the husband permanently from liability for alimony, and thereby indicates an intent that the order shall be final and not subject to modification, it is not such an order as may be modified under section 139, Civil Code, by thereafter imposing liability for alimony.

[6] There is a further reason why the order restoring alimony to plaintiff must be reversed. The trial court erroneously sustained an objection to a question put to plaintiff by defendant's attorney which would have elicited information as to whether plaintiff had remarried after her divorce from defendant. The objection was urged on the ground that the question was incompetent, irrelevant, and immaterial. In sustaining the objection the court remarked: "I again call counsel's attention to the issues that are here. I will sustain the objection." The court had previously stated that the only issues in the case were whether plaintiff was able to support herself, and, if not, whether defendant had means to support her. It is the rule generally and in this state that remarriage of the wife affords grounds for an application to cancel alimony. Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520; Atlass v. Atlass, 112 Cal. App. 514, 297 P. 53; Parker v. Parker, 203 Cal. 787, 266 P. 283; Linton v. Hall, 86 Misc. 560, 149 N. Y. S. 385; see, also, notes, 64 A. L. R. 1269; 30 A. L. R. 79. This rule has been given statutory recognition in this state by the adoption in 1933 of an amendment to section 139, Civil Code (St. 1933, p. 1039). The question put to plaintiff by defendant's attorney was as follows: "How many times did you marry, Mrs. Mc-

Clure?" While it would have been better if said attorney had asked her if she had remarried after her divorce from defendant, the question is broad enough to include remarriage, and in view of the fact that just before he put the question, said attorney had been interrogating her as to matters occurring after the divorce, the question is reasonably understood as applying to remarriage after the divorce, and its materiality is apparent.

[7] The order of 1927 relieving the husband from liability to pay alimony also precluded the court below from allowing $50 costs and $150 attorney's fees to be paid plaintiff if defendant prosecuted an appeal from the order of October 26, 1934. Where the divorced husband has not been released permanently from the obligation to pay alimony, the court may allow the wife costs and attorney's fees to prosecute or defend an appeal from an order of modification, either on the theory that such an award is an additional allowance for support made under section 139, Civil Code, or on the theory that where the power to modify continues, the action is still pending under section 137, Civil Code, which authorizes the court to require the husband to pay money to enable the wife to prosecute or defend the action. Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862. But in the instant case, where the order of 1927 permanently relieved the husband from the alimony obligation, neither section authorized the allowance.

The order awarding alimony and the order allowing costs and counsel fees are reversed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SHENK, J.

MARKET STREET RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

S. F. 15440.

Supreme Court of California.
Sept. 26, 1935.

Rehearing Granted Oct. 24, 1935.

1. Limitation of actions ⚷124

Under general law, except by successor in interest, there can be no amendment changing parties to action after statute of limitations has run.

2. Master and servant ⚷398

Dependent child's claim under Compensation Act for unexpired portion of death benefits awarded mother for father's death *held* barred by one-year statute of limitations, where mother in original claim had not mentioned child, and, prior to child's filing of application upon mother's death three years after father's, child had been neither constructively nor otherwise a party to compensation proceeding (Gen. Laws 1931, Act 4749, §§ 14, 20 (d), 24).

In Bank.

Certiorari to Industrial Accident Commission.

Frank Henry Hopkins and another petitioned the Industrial Accident Commission for the unexpired balance of an award, payable by the Market Street Railway Company, for the death of Alfred E. Hopkins. The Industrial Accident Commission made an award for petitioners, and the Market Street Railway Company petitions for a writ of review and an order anulling the award.

Award annulled.

Prior opinion, 42 P.(2d) 401.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Alfred C. Skaife, of San Francisco, of counsel), for respondents.

PER CURIAM.

After consideration of this cause, we hereby adopt as our opinion herein the following opinion prepared by Mr. Justice Sturtevant for the honorable District Court of Appeal, First Appellate District, Division 2:

The petitioner asks for a writ of review and an order annulling an award of a death benefit. Heretofore the petitioner was a corporation conducting a street railway system in San Francisco, and under authority duly obtained it was self-insured. On July 24, 1930, Alfred E. Hopkins, while employed by the petitioner and in the course of and arising out of his employment, suffered an injury from which he died on the same day. He left surviving him his wife, Minnie Hopkins. On the 30th of July, 1930, she applied for a death

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 57 P.2d 499.

benefit. In due course her application was granted, and the respondent commission made an award. One of the findings was: "The employee left surviving him, wholly dependent, Minnie Hopkins, his wife, who is entitled to a death benefit of $4,695.00, payable at the rate of $19.56 a week, together with an award for $150.00 burial expense payable directly to Minnie Hopkins, the applicant. Said payments are based upon earnings of $5.76 a day for employment five and a half days a week." Neither prior to the date of said award nor before June 27, 1934, did any of the children appear in, nor were they mentioned in, the record. Thereafter, on July 12, 1933, Minnie Hopkins died. Soon after her death the children came forward. Frank Henry Hopkins filed a petition in his own behalf, and Helen M. Michael, his sister, also filed a petition in his behalf, and therein she asked for other relief.

[1, 2] The petitioner answered the petitions of said claimants, and objected at all times to the hearing thereof. Nevertheless, on the 22d of August, 1934, the respondent commission filed an "order altering and amending findings and award for good cause, reassigning death benefit and directing payment of certain accrued and unpaid death benefit." The material portion thereof is as follows: "2. The employee left surviving him, wholly dependent, Minnie Hopkins, his widow, and Frank Henry Hopkins, his adult child who was mentally incapacitated from earning, who together became entitled to a death benefit of $4,695 payable at the rate of $19.56 a week, together with an award of $150 for burial expense payable directly to said widow. The payments are based upon earnings of $5.76 a day for employment 5½ days a week."

At this time the petitioner objects to the amended award and the whole thereof as being in excess of the jurisdiction of the respondent commission. The amended award was made more than four years after the death of the employee. It will be noted that it purports as of its date to so amend the original award as to include Frank Henry Hopkins as one who is wholly dependent. By the express provisions of the statute (2 Deering's Gen. Laws, Act 4749, p. 2272, § 24), no claim for compensation is assignable before payment. Neither does such claim survive if there be no dependent. Section 14. Under the general law in this state, except by a successor in interest, there can be no amendment changing the parties after the statute of limitations has run. Dubbers v. Goux, 51 Cal. 153; Merced Bank v. Price, 9 Cal. App. 177, 189, 98 P. 383; John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 P. 690, 122 P. 835; Altpeter v. Postal Telegraph-Cable Co., 26 Cal. App. 705, 708, 148 P. 241. The question then arises whether the said statute changes that rule in so far as the facts in the instant case are concerned. The petitioner asserts the respondent commission had no such power at the time the order was made and it cites Jones v. Industrial Acc. Comm., 85 Cal. App. 201, 259 P. 73. The decision is directly in point and sustains the contention. The respondent commission cites Great W. P. Co. v. Industrial Acc. Comm., 196 Cal. 593, 602, 238 P. 662, as holding otherwise. We think it does not do so. The pertinent facts of that case, as stated by Mr. Chief Justice Waste (pages 600, 601 of 196 Cal., 238 P. 662, 665), were as follows: "William W. Savercool the grandfather, was not originally a party claimant in the proceeding before the commission. The original application for compensation for the death of the employee was filed December 28, 1920, by James and Lillian Savercool, father and mother of the decedent. Among the other allegations it was therein stated that 'Wm. W. Savercool, grandfather, aged 73,' was one of the dependents; the others being the father and mother, and nine brothers and sisters under 18 years of age. After proceedings had, an award made and set aside, the matter came on for rehearing on June 29, 1922. At that time applicant, James Savercool, requested that William W. Savercool, the grandfather, be joined as a party applicant in the proceeding. Over the objections of petitioner, first, that the request 'came late,' and second, that the grandfather 'was not a member of the household,' the order was made. William W. Savercool was not present at the hearing; no appearance was made for him, other than a waiver of notice and a consent that the hearing proceed, which was entered by the applicant, James Savercool. Thereafter the Commission made its first award, in which it held that the application of the grandfather was barred because not presented in time. When that award was annulled, and the proceedings remanded, the petitioner objected to the inclusion of the grandfather in the action on the ground that he had never requested any relief in the premises. Thereupon, apparently at the behest of the commission, William W. Savercool filed written appearance, and requested that an award be entered in his favor for such amount as he should be entitled to 'by reason of the circumstances involved in this matter.' Formal objection to the grandfather being included in the proceedings was made by petitioner, and, we may assume, overruled, for subsequently the respondent made new findings, in which it decided that the claim of the grandfather was filed within time."

As to the belated filing of a formal application by the grandfather the court said: "No order was made in the matter of bringing William W. Savercool into the proceeding as an applicant until more than 1½ years after the death of the employee. If he was not properly before the commission before that time, either actually or so constructively as to be subject to its jurisdiction, he was not brought in by either of his belated appearances." But, under the facts of that case, as from the beginning of the proceeding, "the grandfather was so constructively before the commission that it had jurisdiction to determine his right to claim compensation." Therefore on the point at issue, at page 602 of 196 Cal., 238 P. 662, 666, the court stated its ruling as follows: "Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11 (a), that, when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11 (a). From this conclusion it results that the respondent did not exceed its jurisdiction in adding William W. Savercool as a party claimant in the proceeding."

In the instant case prior to June 20, 1934, Frank Henry Hopkins was neither constructively nor otherwise a party to the proceeding. The filing on that date of his application did not operate to make him a party. The respondent commission also relies on subdivision (d) of section 20, which provides a continuing jurisdiction. That section is pertinent when jurisdiction has once attached. However, Frank Henry Hopkins did not submit to the jurisdiction of the respondent commission until he filed his petition; therefore no question of continuing jurisdiction was involved. If no award had been made in favor of the mother, it is settled law that the respondent commission would have no authority, at a date more than one year after the death of the employee, to entertain Frank's claim for a death benefit. Marsh v. Industrial Acc. Commission, 217 Cal. 338, 352, 18 P.(2d) 933, 86 A. L. R. 563. Having failed to file an application within the year, the son was barred by the statute of limitations, and had no right to file one thereafter.

The award dated August 22, 1934, is annulled.

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4 Cal.2d 336

DIETLIN v. GENERAL AMERICAN LIFE INS. CO. (two cases).

S. F. 15435.

Supreme Court of California.
Sept. 21, 1935.

Rehearing Denied Oct. 21, 1935.

1. Appeal and error 🔑994(3)
Credibility of witnesses was for trial court sitting without jury.

2. Appeal and error 🔑1011(1)
Trial court's finding, upon conflicting evidence, that disability of plastering contractor who fell from scaffolding on February 18, 1929, was partial and not total after November 22, 1929, within accident policy, would not be disturbed.

3. Appeal and error 🔑1011(1)
Rule that trial court's finding upon conflicting evidence will not be disturbed applies not only to conflict between witnesses for re-

spective parties, but between witnesses for same party.

4. Insurance 🔑526

Where accident policy provided that total disability existed where plastering contractor was disabled from performing "any and every kind of duty" pertaining to his occupation, and that partial disability existed where he was disabled from performing "one or more important daily duties" pertaining to his occupation, contractor *held* only "partially disabled" where he was able to perform some duties pertaining to occupation.

[Ed. Note.—For other definitions of "Partial Disability," see Words & Phrases.]

5. Appeal and error 🔑1060(1)

In action on accident and life policies, alleged misconduct of insurer's counsel in suggesting that moving pictures were in existence which showed insured performing labor which he claimed he was unable to perform *held* not prejudicial on ground that court denied insured's motion to strike statement made by insurer's counsel respecting fraud on part of insured or his attorney, where action was tried without jury and motion was not directed to any statement concerning photographs, and it did not appear that court was affected by suggestion.

6. Pleading 🔑365(2)

Motion to strike must be directed with precision to matter sought to be stricken.

7. Insurance 🔑659(1)

In plastering contractor's action on accident policy, testimony that if contractor was unable to perform any duty he was unable to perform all, and that therefore if partial disability was shown total disability would follow, *held* properly excluded, where policy provided that total disability existed when contractor was disabled from performing "any and every kind of duty" pertaining to his occupation and that partial disability existed if he was unable to perform some duties, and offered testimony did not tend to show that his duties were to be considered as a unit.

8. Trial 🔑29(1)

Where insured's counsel in action on accident policy asked witness whether insured uttered exclamation of existing pain and suffering and witness replied, "He did; all the time," court's statement that court did not think pain and suffering entered into case could not be predicated as error, where insurer's counsel in answer to court's remark stated that "this is merely preliminary," and court said, "Let's proceed."

9. Pleading 🔑121(3)

In action to recover disability benefits under life policies, insurer's denial on information and belief that proof was furnished *held* insufficient, since whether proof was furnished was presumptively within insurer's knowledge.

10. Insurance 🔑560(1)

Insurer waived defense of want of proof of disability under life policies where presumably, with full knowledge that no proof of disability was given, insurer went to trial, participated in appeal, and raised issue of want of proof only on second trial almost three years after original complaint was filed.

11. Insurance 🔑559(2)

Denial of all liability for disability benefits under life policies is waiver of condition requiring proof of disability if it be condition precedent to recovery.

12. Insurance 🔑540

Notice and proof of insured's disability furnished to accident division of insurer under accident policy *held* sufficient notice and proof of insured's disability under life policies issued by same insurer, since insurer's division of its business among several departments should not be permitted to work hardship upon insured.

13. Insurance 🔑540

As respects whether insurer had notice or proof of insured's disability under life policies when notice and proof of disability were furnished under accident policy issued by same insurer, insurer was chargeable with knowledge of all policies issued by it to insured.

14. Appeal and error 🔑1099(3)

Determination on prior appeal that plastering contractor who fell from scaffolding on February 18, 1929, was totally and permanently disabled up to November 22d, but not thereafter within meaning of life policies, *held* law of case on subsequent appeal, where insured waived defense of want of proof.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Actions by Eugene Dietlin against the Missouri State Life Insurance Company, which was substituted by the General American Life Insurance Company. From judgments, plaintiff appeals.

Affirmed in part and reversed in part, with directions.

Prior opinion, 41 P.(2d) 979.

Edmund J. Holl and George Olshausen, both of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent.

WASTE, Chief Justice.

At the time this cause was taken over we were in disagreement with only a portion of the opinion filed herein by the District Court of Appeal, First Appellate District, Division 1. We therefore adopt as and for the decision of this court the following portions of the opinion prepared by Mr. Justice Held, sitting pro tempore with the District Court of Appeal:

Missouri State Life Insurance Company, a corporation, issued to plaintiff and appellant three policies of insurance, each providing for disability payments. One of these policies we designate herein as the "accident policy," and the other two as the "life policies." The provisions as to disability payments in the life policies are identical, but differ from those in the accident policy. The plaintiff was a plastering contractor, and on February 18, 1929, while the above-named policies were in force, he fell from a scaffolding and sustained injuries consisting of fractures of the bones of both heels and a wrenched back. For four months immediately following the accident he was confined to a hospital; thereafter he remained at his home in San Francisco for a month, and then upon the advice of his physician he went to Healdsburg. There he remained until November 22, 1929, at which time he returned to his home in San Francisco. The trial court found that total disability of plaintiff existed until his return from Healdsburg, and that thereafter he was partially disabled only.

The accident policy provided for weekly payments of $50 each during the period of total disability, so long as the assured might live, and $25 per week during the period of partial disability, but not exceeding fifty-two consecutive weeks. The life policies provided for payments of $10 per month for each $1,000 of the face amount of the policies, if the assured became totally and permanently disabled within the definition of the policies, viz., if the disability be such as to prevent the assured then and at all times thereafter from engaging in any gainful occupation.

No payments were made by defendant under the life policies. After the accident, payments on the accident policy to the extent of $1,107.14 as disability indemnity, and $750 hospital indemnity, were made by defendant. Defendant conceded further payments were due under the accident policy, but a dispute arose as to the extent of the period for which plaintiff was totally disabled within the meaning of the accident policy, and as to whether the disability was at all total and permanent under the life policies. Thereupon actions were instituted by plaintiff on the policies. These actions were consolidated and tried together in the court below. Separate judgments were entered in favor of plaintiff, and defendant appealed. The judgments were reversed. Dietlin v. Missouri State Life Insurance Company, 126 Cal. App. 15, 14 P.(2d) 331, 15 P.(2d) 188. A second trial was had, the order of consolidation remaining in effect. At the opening of the second trial, an amendment to the answer on the life policies was permitted by the court, which amendment will hereafter be referred to. On the second trial plaintiff had judgment on the accident policy for the sum of $2,208.52. The court found that total disability of plaintiff had terminated on November 22, 1929, and the sum so awarded plaintiff was the aggregate amount (less payments theretofore made) of weekly payments of $50 each from February 18, 1929, to November 22, 1929, and fifty-two weekly payments of $25 each, the maximum period allowed by the policy for partial disability. In addition, the judgment included $30 for surgical attendance.

On the life policies, judgment went for defendant.

Plaintiff has appealed from both judgments, and the appeals are before this court on a single transcript. The Missouri State Life Insurance Company, which issued the policies, was dissolved after entry of judgment in the trial court, and pursuant to stipulation of the parties and order of court General American Life Insurance Company was substituted.

The difference in the language of the disability provisions of the two forms of policies involved here renders it necessary that the appeals be separately considered.

In his application for the accident policy the plaintiff stated his occupation as follows: "Plastering contractor—Office, estimating and supervising duties only."

The trial court found and defendant concedes that plaintiff was totally disabled from February 18, 1929, the date of the accident, to November 22, 1929, when plaintiff returned to San Francisco from Healdsburg. The court found, and defendant contends, that after November 22, 1929, the disability of plaintiff was partial only. Following these findings, the court, as heretofore stated, awarded plaintiff $50 per week from February 18, 1929, to November 22, 1929, and $25 per week thereafter for fifty-two weeks, less payments theretofore made. Defendant contends that these findings are in accordance with the decision on the prior appeal. The plaintiff, however, claims that by reason of additional evidence produced by him on the second trial, he has established total disability without interruption to the month of July, 1931. At the opening of the second trial, his contention was that total and permanent disability existed even then.

The accident policy provides that total disability exists where the injuries disable the insured from performing "any and every kind of duty pertaining to his occupation." Partial disability exists where such injuries disable him from performing "one or more important daily duties pertaining to his occupation." The trial court found that his injuries disabled plaintiff from the date of the accident to and including the 22d day of November, 1929, "from performing any and every kind of duty pertaining to his occupation; that said total disability did not continue subsequent to said 22nd day of November, 1929." The court also found that said injuries disabled plaintiff from the 22d day of November, 1929, and for a period of fifty-two weeks thereafter "from performing one or more important daily duties pertaining to his occupation."

The nature of the duties of plaintiff in following the occupation of "Plastering contractor—Office, estimating and supervising duties only" was testified to by plaintiff. In the performance of his office work, he was required to visit the offices of various contractors and obtain plans of work to be done. At his office, he made estimates of the cost of such work and the amount of his bid therefor. His office was in his home. If he was awarded a contract on his bid, he would then be required to go upon the job twice a day, and go over the job to take measurements for different ornamental work. He testified that this required his personal attention, which no foreman could do, but had to be done personally. He further testified that in supervising the work it was necessary that he ascend ladders and climb on scaffolds. On cross-examination he testified that on some jobs he had a foreman, and that others he supervised in person. He admitted also that in another action arising out of this accident his deposition was taken, and that he then testified as follows:

"Q. Well, ordinarily in your contracts do you actually do the work? A. No.

"Q. You just superintend the work? A. I have a foreman on the job to run my work, and I just come to the job to see what is needed, and take the time of the men, and have a talk with my foreman and leave. * * *"

On the trial he admitted that he had made these statements, and that the same were true. The trial court was therefore justified in accepting such statements as correctly setting forth the duties devolving upon him as a plastering contractor.

The plaintiff on the second trial testified unequivocally that until July, 1931, he could do no office work. Also, that "because my feet hurt me too much" he was nervous and unable to concentrate, and as a result could do neither estimating nor supervising work. On the first trial Dr. Dresel, who attended plaintiff following the accident, was asked: "Q. So far as estimating, as far as placing valuations upon work, as far as entering into contracts as a contracting plasterer, so far as supervising, except the pain, he cannot climb, possibly, but the man has been perfectly competent to perform all other duties in connection with his occupation. That has reference to a mental belief. * * * A. I believe so." Again: "Q. What would you say as to his condition at the present time with reference to his ability to perform the duties of supervising plastering work? A. He will be able to do everything except climb scaffolds and ladders."

On the first trial Dr. Dresel estimated the distance that plaintiff could walk at not to exceed 20 blocks. His notes produced on the second trial showed that on March 10, 1930, the plaintiff walked half a mile with the use of a cane. This witness also testified on the first trial that plaintiff could operate an automobile.

Dr. Dresel on the second trial testified to a much greater disability of plaintiff and stated that he had on the previous trial understated the seriousness of the condition of plaintiff. The record here shows also that plaintiff now makes no claim for total disability after July, 1931, and yet on February 18, 1933, he made a claim for total disability on a policy with California Western States Life Insurance Company and Dr. Dresel accompanied this claim with his written statement that the plaintiff was then totally disabled. The trial court was called upon to determine the credibility of the witnesses, and may have chosen to accept the testimony given by Dr. Dresel on December 3, 1930, at the first trial.

On the first trial, the only witnesses to support the case of plaintiff were the plaintiff himself and Dr. Dresel, and the District Court of Appeal held that the evidence did not warrant a finding of total disability after November 22, 1929. Plaintiff claims, however, that the additional evidence produced on the second trial demands a finding of total disability until July, 1931. The witnesses who testified on behalf of plaintiff on the second trial, other than plaintiff and Dr. Dresel, were B. F. Barnard, Olga Dietlin, the wife of plaintiff, Carol Dietlin, their son, and Dr. George J. McChesney. Barnard was the man at whose premises in Healdsburg plaintiff spent several months prior to November, 1929. He did not see plaintiff after the latter left Healdsburg; nor does the testimony of this witness indicate that plaintiff was totally disabled when he left Healdsburg. The witness Dr. McChesney first met plaintiff in December, 1930, and testified that plaintiff was then totally disabled. However, when the attention of the witness was called to the nature of plaintiff's duties, he admitted that if they consisted of office work only, to be performed in plaintiff's home, the plaintiff could do such work. The substance of Dr. McChesney's testimony is that it would cause plaintiff some pain and inconvenience to stand on his left foot, but that such pain would not disable him from performing at least some of the duties of his occupation. There is nothing in the testimony of Dr. McChesney that refutes the theory of defendant that plaintiff was only partially disabled on November 22, 1929, more than one year before Dr. McChesney even met plaintiff.

We have carefully reviewed the testimony of Mrs. Dietlin and Carol Dietlin. Nothing therein adds weight to plaintiff's contention that he was totally disabled after his return from Healdsburg. Their testimony was in the main a recital of subjective symptoms manifested by plaintiff.

[1] On the previous appeal the reviewing court pointed out wherein the evidence was lacking to establish total disability after November 22, 1929. During total disability, plaintiff was entitled to receive $50 per week. Total disability once terminated could not be reinstated, even though that condition should again result, for under the terms of the policy the totality must be continuous. Any interruption would terminate all payments except to the extent of $25 per week for fifty-two weeks. The trial court here was vested with the power of judging of the credibility of the witnesses, and in the exercise of that function may have had in mind the temptation on the part of plaintiff to magnify the seriousness of his condition. The testimony of his wife and son and that of Dr. Dresel, that plaintiff was under greater disability than previously appeared, was predicated largely upon acts and conduct of plaintiff, the genuineness of which the witnesses could not test.

At the beginning of the second trial plaintiff contended that at that time (March 27, 1933) the total and permanent disability of plaintiff existed. However, during the trial it appears that the contention of plaintiff was modified, for on April 26, 1933, the record shows: "Our claim goes only until July of 1931, and we are making no claim here beyond July, 1931, of any claim of total and permanent disability." This concession is inexplicable. If plaintiff was totally disabled after July, 1931, no reason is apparent why he should waive payment of any sums to which he might be entitled. The trial court might have well attributed this concession to the fact that following the claim of plaintiff's total disability at that time, the attorney for defendant indicated by his examination of one of the witnesses that evidence was in existence which would show that plaintiff was actually engaged for several days shortly preceding the trial in the manual labor of plastering, and did such work upon a scaffold, and therefore could not then be totally disabled. If the trial court adopted this view, the concession by plaintiff operated to discredit his case. The plaintiff admitted on the trial that he had done certain manual labor on March 5, 6, and 7, 1933. He admitted also that on March 16, 1933, when a representative of the defendant called upon him, he denied that he was able to do such work. On March 18, 1933, when this same representative found him at work, he admitted that that which he had previously stated as to his condition was not true.

The present case is one where the conclusion of the trial court is based on conflicting evidence. Not only did the trial judge observe the conduct and demeanor of the witnesses, but he had an opportunity to observe the physical condition of plaintiff and his ability to move about.

[2, 3] The finding that total disability of plaintiff did not continue subsequent to the 22d day of November, 1929, is based, as we have seen, upon conflicting evidence, and the action of the trial court will not be disturbed. The rule as to conflict applies not only to a conflict between the witnesses for the respective parties, but between the witnesses for the same party. 2 Cal. Jur. 930; Frazee v. Fox Film Corp., 45 Cal. App. 661, 188 P. 286.

[4] Appellant contends also that even though he was disabled only from performing a material part of his duties as a plastering contractor, he was nevertheless totally disabled within the meaning of the law. It is established by the evidence that on November 22, 1929, the appellant was not able to climb ladders and scaffolds, and also that as a part of his duties as plastering contractor he was required to do so. The policy provides that total disability exists where the injuries disable the insured from performing "any and every kind of duty pertaining to his occupation." On the other hand, partial disability exists where he is disabled from performing "one or more important daily duties pertaining to his occupation." Appellant complains that the trial court applied a literal construction to the words "total disability." We fail to see how the term could have been construed otherwise. He is not totally disabled unless he is prevented from performing "any and every kind of duty pertaining to his occupation." If he is disabled only to the extent of being unable to "perform one or more important daily duties," he is within the definition of the term "partial disability."

There is no contention that it is necessary that appellant be helpless and unable to perform any of his daily duties, to constitute total disability. However, where he is disabled only from performing one or more of those duties, and is able to perform others, he is only partially disabled. It was so held on the former appeal [41 P.(2d) 979], where it was said: "Although the evidence was sufficient to show that after November 22, 1929, he was disabled from performing 'one or more important daily duties pertaining to his occupation,' such disability was clearly a partial disability and not a total disability as defined in the policy as he was not disabled from performing 'any and every duty pertaining to his occupation.'" We adhere to the construction placed upon the language of the policy on the former appeal.

[5, 6] Appellant complains of alleged misconduct of counsel for respondent in suggesting at the trial that moving pictures were in existence which showed appellant performing labor which he claimed he was unable to perform. It is conceded that "certain" photographs of plaintiff were taken by a representative of defendant company, but what those photographs showed does not appear, nor whether they were still or moving pictures. In the cases cited by appellant where alleged misconduct of counsel was relied on, trial was in every instance before a jury. Here the case was tried by the court without a jury. Appellant contends, however, that the trial judge was prevented from passing on the merits of the case by the injection into the case of false quantities, and that therefore the usual presumption that a judge is uninfluenced by extraneous matter does not hold. Certain remarks of the trial judge are relied on to indicate that he was so influenced. But we do not so understand the record. The trial judge stated with reference to moving pictures, "if the facts as indicated will be developed—I don't know whether they will or not." This would indicate that the court did not then assume that such pictures existed, nor that they would be produced. His mind was entirely open and unaffected.

The fact that, subsequently, the court denied the motion of plaintiff to strike from the record any and all statements made by the attorney for defendant as far as any fraud on the part of plaintiff or his attorney is concerned, is no indication that the court considered as proven the existence of moving pictures of plaintiff at work. The motion was not directed to any statement concerning the photographs. A motion to strike must be directed with precision to the matter sought to be stricken. 24 Cal. Jur. 778. This was not done here.

We are satisfied from a careful review of the record that the trial court was in no manner affected by any statement of counsel for plaintiff [defendant] as to the existence of photographs.

[7] Appellant contends also that the trial court in excluding testimony which plaintiff sought to elicit and tending to

show that the nature of plaintiff's duties was such that if he was unable to perform any thereof, he was unable to perform all, and that therefore if partial disability was shown, total disability would follow. We are satisfied that the trial court followed only the decision on the previous appeal in holding that after ability of plaintiff to perform certain substantial portions of his daily duties had been admitted by plaintiff, proof that he could not perform certain other important portions of those duties was not relevant. Furthermore, the offer of proof made by plaintiff did not tend to show that his duties were to be considered as a unit or as a whole. The offer was merely to prove that as a part of the supervising duties of a plastering contractor, it was necessary for him to inspect the premises and to climb ladders and scaffolds in doing so. The offer did not go to the extent that if plaintiff could not climb ladders and scaffolds, he could perform none of the duties of a plastering contractor.

[8] Appellant urges also that "the court erred in holding pain to be no element of disability." The alleged error is predicated upon the following record. Plaintiff's counsel asked a witness concerning the plaintiff the following: "Now, during that time did he at any time utter any exclamation of existing pain and suffering?" The witness answered: "He did; all the time." Counsel for defendant made an objection after the question was answered, and the court stated: "I don't think your pain and suffering enter into this, do they?" Counsel for plaintiff stated that this "is merely preliminary" and the court said: "Let's proceed." No authority is cited by appellant in support of his contention that this was error, and we perceive none in the incident.

The disability clauses contained in the life insurance policies are essentially different from the above-quoted clauses found in the accident policy. These provisions contained in both of the life insurance policies were as follows:

"Total and Permanent Disability Benefit. The Company will pay to the insured a life income of Ten Dollars each month for each $1000 of the face amount hereof if the said insured shall become totally and permanently disabled, as hereinafter defined, before attaining age sixty. The first payment of such income shall be made immediately upon receipt by the Company of due proof of total and permanent disability, and subsequent payments shall be made monthly thereafter as long as the insured lives and suffers such disability, and shall be in addition to all other benefits provided by this policy. * * *

"Total and permanent disability may be due either to bodily injuries or to disease, which must occur and originate while this policy is in full force after the first premium has been paid, and must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation. Total Disability, as defined above, which exists and has existed continuously for not less than three months shall be presumed to be permanent. At any time after approval by the Company of the aforesaid proof and from time to time, but not oftener than once a year after disability has continued for two full years from the date of approval, it may demand of the insured proof of the continuance of such disability and the right to examine the person of the insured. Upon failure to furnish such proof or if it appears that the insured has recovered so as to be able to engage in any gainful occupation, the Company's obligations to pay further Disability Benefits shall cease and the insured shall be required to pay the premiums becoming due on this policy thereafter in accordance with the original terms thereof."

On the previous appeal, it was held that the disability clauses in the life policies created a conclusive presumption of permanent disability where total disability continuously existed for not less than three months, and entitled the assured to the disability benefits during the entire period that the total disability might continuously exist. The plaintiff was therefore held entitled to disability benefits under the life policies from the date of the accident to November 22, 1929. At the opening of the second trial defendant sought and was granted permission by the court, and filed, an amended answer whereby allegation VI of the complaint was denied for lack of information or belief. There are two allegations so numbered in the complaint, but it is apparent that the allegation referred to is that which reads as follows: "That said plaintiff Eugene Dietlin has fulfilled and performed all of the conditions, terms and agreements of said policy of insurance on his part to be performed, and that said plaintiff within sixty days before the commencement of this action, gave due notice and proof of injuries received by said plaintiff as aforesaid, and due notice and proof of total and permanent disability resulting therefrom." The court found: "That said plaintiff, Eugene Dietlin, has not fulfilled and performed all of the terms and conditions and agreements in said policy on his part to be performed, and that said Eugene Dietlin did not within sixty days before the commencement of this action or at any other time or at all give due or any notice of proof of injury received by plaintiff and of total and permanent disability resulting therefrom."

It thus appears that on the second trial the question whether proof of disability was furnished, and if so, whether it was timely, was raised for the first time.

The complaint on the life policies was filed on March 29, 1930. This pleading alleged the furnishing of proof. The original answer was filed on June 16, 1930, and did not deny that proof was furnished. The case was tried on these pleadings and judgment rendered; an appeal was taken and the appeal decided on September 15, 1932. The amended answer was filed on March 27, 1933. In that pleading, the giving of proof of disability was first denied, and then only for lack of information or belief.

The appellant urges now that the defense of want of proof must be deemed waived, because not sooner raised; and also that the denial is insufficient because made for lack of information or belief of a fact presumptively within the knowledge of defendant.

[9] It would seem that the defendant should have known and presumably did know when the original answer was filed that no proof of disability had been furnished. That was a fact presumptively within its knowledge. Therefore a denial on information and belief is insufficient. Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A. L. R. 871. In Janson v. Bryant, 52 Cal. App. 505, 199 P. 542, 543, the following quotation from an earlier case is quoted with approval (Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144): "'It has been decided that an allegation of a verified complaint could not be controverted on information and belief when the alleged fact was presumably within the knowledge of the defendant, nor when the defendant had the means of ascertaining whether or not it was true.'"

[10] We therefore hold that there was no sufficient denial of proof of disability. Furthermore, almost three years intervened between the filing of the complaint and the filing of the amended answer which first raised the issue. Presumably, with full knowledge that no proof of disability was given, the defendant went to trial, participated in an appeal, and only when the case was on for trial the second time did defendant deny the furnishing of proof, which it contends was a necessary part of plaintiff's case in the first instance. The case comes squarely within the decision of this court in Goss v. Security Insurance Co. of California, 2 Cal. App. (2d) 459, 38 P. (2d) 188, decided after the oral argument herein.

[11] Furthermore, even if the issue had been properly and timely raised, it would seem that where as here the defendant denied all liability, there is a waiver of the condition requiring proof of disability, if it be a condition precedent to recovery. Hill v. Mutual Benefit Health, etc., Ass'n, 136 Cal. App. 508, 29 P.(2d) 285; Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 180 P. 607; Restatement of the Law [Contracts], § 306.

[12] We cannot accept the balance of the District Court of Appeal opinion wherein it is held that, though there had been a waiver by defendant of proof of disability, nevertheless it was indispensable that plaintiff furnish such proof during the continued existence of the total disability in order to fix the time when payments under the policies first became due. The circumstances of this case are such that plaintiff's failure to furnish formal proof of disability under the life policies is not fatal to his right to recover on these policies. In our opinion, the record indicates that defendant had ample and timely notice and proof of plaintiff's disability. We fully appreciate that such notice and proof were furnished to the accident division of defendant company or to a representative of that division. However, the important fact is that defendant received timely written and oral notice of plaintiff's disability which must be held sufficient to charge defendant on all policies running in favor of the insured. The disability benefit clauses of the life policies provide for payments thereunder "upon receipt by the company of due proof of total and permanent disability. * * *" No particular form of proof is prescribed. That the defendant received "due proof" of plaintiff's disability and made payments to him under the

total and permanent disability clauses of the accident policy is, as indicated above, fully established by the record herein. The defendant's division of its business among several departments should not be permitted to work a hardship upon the insured.

[13] It appears from the testimony of defendant's claims adjuster that he was in touch with the plaintiff "within a week or possibly two following the accident." As already intimated, we are not impressed by the fact that this person testified that he visited plaintiff solely in connection with the accident policy and did not remember that he had at any time discussed with plaintiff the latter's claims under the life policies. The witness would not deny that the life policies had been discussed. He merely was without memory on the subject. Plaintiff, on the other hand, testified positively that in June, 1929, during the continuance of the total disability, he had discussed with defendant's representative not only his claim under the accident policy but also his claims under the life policies, and that defendant's representative stated "we will pay you those life policies." Moreover, the record discloses that under dates of March 25, 1929, May 1, 1929, June 5, 1929, June 27, 1929, and July 23, 1929, upon which last date he left his home to recuperate in the country, plaintiff had filed with the defendant company written reports or affidavits showing total disability to be present at each and all of these times. All of these reports were received by the defendant long prior to the termination of plaintiff's total disability. Their effect, as notice to the defendant of plaintiff's disability, is not lessened, as we have indicated, by the fact that they were furnished in connection with the accident policy. Defendant is chargeable with knowledge of all policies issued by it to the insured. In addition, we find in the record a copy of a letter dated three days prior to the expiration of plaintiff's total disability, wherein he made demand for payment of the disability benefits provided for in the life policies.

[14] We are also of the view that, the defendant having waived the defense of want of proof, as declared above, the situation now confronting us is identical with that which existed upon the prior appeal, and the following language of the opinion then filed must be held to be the law of the case: "Under this construction, respondent was entitled to the disability benefits under the life policies from the date of the accident up to November 22, 1929, as respondent's total disability, existing continuously during said period of approximately nine months, must be treated as 'permanent' within the meaning of the policies." Dietlin v. Missouri State Life Ins. Co., 126 Cal. App. 15, 26, 14 P.(2d) 331, 15 P.(2d) 188.

The judgment in the action involving the accident policy, numbered in the court below 212,855, is affirmed. The judgment in the action involving the life policies, numbered in the court below 217,765, is reversed, with directions to the court below to proceed as herein indicated.

We concur: THOMPSON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

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4 Cal.2d 384

WALSH v. MAJORS et al.

S. F. 15273.

Supreme Court of California.

Sept. 27, 1935.

1. Fraud 🔑49

In action of fraud, where complaint charged misrepresentations as to value of realty in which plaintiff had been left interest by her sister's will, proof showing representations as to nature and value of plaintiff's interest in her sister's estate *held* not material variance, since matter proven so closely approximated matter alleged that defendant could not have been misled thereby.

2. Appeal and error 🔑1010(1)

In action of fraud charging misrepresentations as to value of realty, weight of inadmissible testimony as to amount of offer to buy such realty, which was received without objection, *held* question for trial court.

3. Fraud 🔑57

In action of fraud for misrepresentations as to value of realty, admission in evidence of appraisal of such realty in estate proceedings *held* not error where papers in estate proceedings were not admitted to prove value of property.

4. Fraud 🔑58(1)

In action for misappropriation of wearing apparel to which plaintiff was entitled under will, evidence *held* insufficient to sustain finding that such wearing apparel was represented to be worth not exceeding $25.

5. Fraud 🔑58(2, 4)

In action of fraud in distribution of estate under will, record *held* to support conclusion that defendants falsely represented to plaintiff that her interest in estate was half residue after all expenses had been met, and would probably not amount to $500, whereas she was entitled under will to one-half of proceeds of sale of specific piece of realty which was reasonably worth $2,500, that one defendant appropriated two fur coats to which plaintiff was entitled under will, and in reliance upon false representations plaintiff was induced to part with her interest in estate for grossly inadequate sum of $500.

6. Judgment 🔑464

Equity has jurisdiction to grant relief from fraudulently obtained judgments and orders in probate by declaring the beneficiary a trustee for those defrauded.

7. Cancellation of instruments 🔑37(4)

In action for rescission of assignment induced by fraud, complaint *held* to state cause of action, although failing to allege that prior to suit plaintiff restored or offered to restore consideration received for assignment, where plaintiff had received nothing to which she was not entitled independently of assignment and defendant had received more as result of assignment than amount paid as consideration for assignment.

8. Cancellation of Instruments 🔑37(4)

Party seeking rescission in equity need not restore, or offer to restore, what he has received as condition precedent to action where, by reason of special circumstances, it has on general equitable principles become unfair to impose such condition of relief.

9. Judgment 🔑464

Judgment directing conveyance to plaintiff of undivided half interest in real property, to which plaintiff was entitled by will and which defendants had wrongfully received under decree of distribution, free and clear of encumbrances, *held* correct where it did not appear that there were any encumbrances on property at time of decedent's death which had not been discharged before distribution of estate.

10. Cancellation of instruments 🔑57

In equitable action for rescission of contract on ground of fraud, plaintiff may state facts surrounding transaction and pray for any and every kind of relief to which under facts he may show himself entitled, including claim for damages, and court of equity has duty to adjust all differences arising from cause of action presented and to leave nothing for further litigation.

11. Cancellation of instruments 🔑55

In action for rescission of fraudulently obtained assignment of interest in property, to which plaintiff was entitled under will, which resulted in wrongful distribution of estate, and to have fraudulent dstributee declared trustee, plaintiff *held* not precluded from obtaining judgment for damages in same action against distributee of estate and executor who participated in such fraud.

12. Trusts 🔑358(1)

Where plaintiff sought to rescind fraudulently obtained assignment of interest in property, to which plaintiff was entitled under will, and to recover for appropriation of coats bequeathed by such will which were represented by proceeds of insurance, imposition of lien on realty for value of coats *held* improper, since realty and insurance proceeds were distributed at same time and there was no possibility that insurance proceeds were used in acquisition of property or proof that they were applied upon realty in any way.

13. Trusts 🔑358(1)

Equitable lien of beneficiary depends upon his being able to trace trust property into particular property against which he seeks to enforce trust, or to show commingling of trust property with fund upon which he asserts his lien.

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Edyth Walsh, also known as Edith Walsh, against Joseph A. Majors, Thomas Butler, and Fred A. Majors, as administrator of the estate of Joseph A. Majors, deceased, substituted defendant. Judgment for plaintiff, and defendants appeal.

Judgment modified, and as so modified affirmed.

James Snell and Chester E. Ross, both of Hollister, for appellants.

George D. Pollock, of Salinas, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment in favor of the plaintiff on the grounds that the pleadings do not support the judgment, the complaint does not state a cause of action, the evidence does not support the findings, and the findings do not support the conclusions of law and the judgment.

The material allegations of the complaint are that, on or about April 26, 1931, Mabel Lola Majors died testate, in the county of Monterey, leaving an estate consisting of real and personal property, a copy of the will being annexed to the complaint and the probate proceedings being incorporated by reference; that, on or about May 25, 1931, defendant Thomas Butler was appointed executor of the estate of Mabel Lola Majors and so qualified; that Edith Walsh, the plaintiff, is the sister of Mabel Lola Majors; that by the terms of the will certain described real property, located on Van Ness avenue in the city of Watsonville, in Santa Cruz county, was directed to be sold and a sum equal to one-half the proceeds was bequeathed to the plaintiff; that the defendants (Butler and Joseph A. Majors, the surviving husband of Mabel Lola Majors) falsely and fraudulently represented to the plaintiff that the value of the described real property did not exceed $1,000; that the defendants knew the representations were false and made them with the intent and design of inducing plaintiff to assign her one-half interest in the proceeds of the sale to Joseph A. Majors; that the reasonable value of the described realty was then and now is $5,000 and that it could at all times mentioned in the complaint have been sold for more than $1,000; that (on information and belief) the real property was not sold as directed by the will but was distributed to Joseph A. Majors on April 18, 1932, and that he has since been the legal owner of the property; that, by the terms of the will, the plaintiff was also bequeathed all of the wearing apparel belonging to Mabel Lola Majors; that the deceased owned at the time of her death two fur coats of the approximate value of $2,000 and other wearing apparel, with regard to which plaintiff asks leave to amend for the purpose of alleging the value when ascertained; that plaintiff believed and relied upon the false and fraudulent representations and, in reliance thereon, executed to Joseph A. Majors an assignment of her interest in the estate on September 1, 1931; that plaintiff's interest in the proceeds of the sale of the described realty was reasonably worth $2,500, that her interest in the wearing apparel was reasonably worth $2,000, and that her entire interest in the estate was reasonably worth $4,500; that as consideration for the assignment she received $500 which was grossly inadequate; that, by reason of the false and fraudulent statements of the defendants and by reason of the defendants' concealing and withholding the true nature and value of the assets of the estate, plaintiff has been deprived of her just share therein and damaged in the sum of $4,000. It is further alleged that defendant Butler received from the assets of the estate $439.85 for his services as executor and that each of the defendants have in their possession or under their control a portion of the assets of the estate, to a part of which the plaintiff is entitled and which, by reason of the matters alleged, they are holding for the use and benefit of the plaintiff. The prayer of the complaint is for an inventory and accounting of the assets of the estate, a declaration that the assignment is void and the consideration given therefor is a part payment of the plaintiff's interest, a judgment for $4,000 damages and a declaration that Joseph A. Majors is a trustee of the described realty for the benefit of the plaintiff to the extent of $4,000, costs of suit and general relief.

The court found that Mabel Lola Majors, wife of defendant Joseph A. Majors and sister of plaintiff Edith Walsh, died testate on April 26, 1931, leaving real and personal property; that probate proceedings were instituted about May 11, 1931, and that Thomas Butler was appointed executor May 25, 1931; that by the terms of the will the described real property, situated in Santa Cruz county, was directed to be sold and a sum equal to one-half of the proceeds was bequeathed to plaintiff; that the defendants each falsely and fraudulently represented to plaintiff that the true value of the real property did not exceed $1,000; that defendants knew the representations were false and that they were made with the intent and design of inducing the plaintiff to assign her one-half interest in the proceeds of the sale to Joseph A. Majors; that the reasonable market value was and is $5,000 and the property could have been sold for that or more; that the plaintiff's interest in the proceeds is reasonably worth $2,500; that the realty was not sold as directed by the will, but was distributed to Majors on January 18, 1932, who since that date until his death, on or about January 18, 1934, was the legal owner of the property; that on February 2, 1934, letters of administration in the estate of Joseph A. Majors were granted to Fred A. Majors, and on February 19, 1934, Fred A. Majors, as administrator, was substituted for Joseph A. Majors as defendant herein.

With regard to the wearing apparel, the court found plaintiff had been bequeathed all the wearing apparel of her sister; that at the time of her death Mabel Lola Majors was the owner of two fur coats of the estimated value of $2,000; that after her death the coats were in the possession of Majors at the Majors home in Monterey county at the time they were destroyed by fire; that at the time of their loss by fire they were of the reasonable value of $750; that the sum of $3,050, proceeds of fire insurance covering loss of furniture, fixtures, and wearing apparel in the Majors home, was paid to the estate of Mabel Lola Majors and distributed to Majors; that the defendants falsely and fraudulently represented to plaintiff that the wearing apparel of her sister was of small value not exceeding $25; that they knew these representations were false and made them with the intent and design of inducing plaintiff to assign her interest therein to Majors, without paying plaintiff their fair value; that defendants falsely and fraudulently represented to plaintiff that the administration costs of her sister's estate and cost of $1,500 for interment in a niche, as directed by the will, were by the terms of the will payable out of plaintiff's interest; that the decedent has not been so interred but was buried at small expense in Castroville; that these false and fraudulent representations, with the others previously found, caused plaintiff to make the assignment of her interest in the estate for $500; that she would not so have assigned if the representations had not been made by the defendants. The court further found that Butler wrote to plaintiff in Longview, Tex., about June 11, 1931, informing her the amount of her legacy was uncertain; that the purpose and effect of this letter was to cause plaintiff to believe that the debts, funeral expenses, and costs of administration were to be paid out of her interest and that such representations were made knowingly, falsely, and willfully with intent to deceive plaintiff as to the value of her interest; that in the letter Butler promised to protect plaintiff's interest in the estate; that by the terms of the will such debts and expenses were not payable out of plaintiff's interest; that plaintiff believed and relied upon the false and fraudulent statements and as a result executed the assignment to Majors on or about September 1, 1931; that on that date her entire interest was reasonably worth $3,250; that she received as consideration therefor $500, which sum was grossly inadequate; that Butler claims an interest in the Watsonville property in the form of a mortgage securing a promissory note alleged to have been made and delivered by Majors to Butler after the execution of the assignment and after the estate had been distributed; that at the time of making the assignment the plaintiff was ignorant of the true nature and value of the property bequeathed her; that defendants knowingly and fraudulently withheld from her knowledge of its true nature and value and that their collusion, fraud, and deceit caused her to make the assignment.

On these findings the court arrived at the following conclusions of law: (1) That the deceit and fraud of Majors was proved beyond a reasonable doubt and to a moral certainty and the collusion and fraud of Majors and Butler was proved by a preponderance of the evidence and therefore the plaintiff had sustained her burden of proof; (2) that plaintiff was entitled to a decree declaring that Majors, at the time of his death, held title to an undivided one-half of the Watsonville property for the plaintiff; (3) that plaintiff have judgment against defendants in the sum of $750 minus $500 theretofore paid to her at the time of the assignment, with interest from January 18, 1932, the date of the decree of distribution, and that the judgment be a lien on the realty prior to the lien of Butler's mortgage; (4) that the assignment is null and void on account of the deceit and fraud of the defendants in its procurement; (5) that in the event an undivided one-half of the realty could not be conveyed to plaintiff free and clear of all encumbrances, the estate of Joseph A. Majors and Thomas Butler pay to plaintiff the full value thereof, $2,500 with interest from January 18, 1932, and that such amount be a lien on the realty; and (6) that in the event the undivided one-half interest could be conveyed to plaintiff free of encumbrances, the estate of Joseph A. Majors account to plaintiff for rents, issues, and profits from January 18, 1932. Judgment was entered accordingly.

The undisputed facts establish the following background for the fraud with which the defendants are charged:

Mabel Lola Vallee and Joseph A. Majors were married in 1929. They had been living together prior to marriage and had, in 1923, jointly acquired the Watsonville house, and since then other real property. At some time before her death and in settlement of a dispute between them, Majors had deeded his wife all his interest in the jointly held realty. Mrs. Majors died on April 26, 1931, having a few days before called upon the defendant Butler to draw her will, which was executed on April 21, 1931. The relevant parts of the will are as follows: "Second—I request that I be interred in a niche in the Mausoleum at San Jose, Santa Clara County, California, with Mass at the Catholic Church in Castroville. * * * Fifth—I give, devise and bequeath to my said sister, Mrs. Edith Walsh of Stuttgart, Arkansas, a sum equal to one-half of the proceeds of the sale of my real property situate on Van Ness Avenue, Watsonville, Santa Cruz County, California, and all my wearing apparel." There followed a residuary clause in favor of the defendant Majors and the appointment of Butler as executor with instructions "to sell for cash the real property situate on Van Ness Avenue, Watsonville, California, for the best possible price obtainable."

On June 6, 1931, Mrs. Walsh, having heard of her sister's death, wrote to Butler from Longview, Tex., inquiring as to the disposition of the estate. Butler replied, on June 11, 1931:

> "You have an interest in the estate of Mrs. Majors, deceased, but at this time I am unable to state what the amount of your legacy will be, because it is uncertain at this time what the debt of the deceased will amount to.
>
> "She was the owner of a dwelling house, in Watsonville, of the probable value of $3000.00, which she has ordered sold by her will and after payment of her just debts and funeral expenses and expenses of administration you were given one half of the remainder of the cash on hand. Your interest will be protected by myself and the Court of Probate wherein the estate is being administered, and after the above expenses have been paid you will receive your share upon the order of distribution when made by said court."

Mrs. Walsh and her husband arrived in Castroville the last of August and went to the home of Majors, their purpose being to attempt to borrow money on Mrs. Walsh's interest in the estate. The day after her arrival, in Butler's office in Pajaro, Mrs. Walsh signed an agreement to assign her interest in the estate to Majors for $500, and on September 1, 1931, likewise in Butler's office, executed the formal assignment.

The evidence on the question of the representations of Majors and Butler is extremely conflicting. But, disregarding opposing testimony, it appears from the testimony of Mr. and Mrs. Walsh that they approached Majors on the subject of obtaining a loan on Mrs. Walsh's interest in the estate on the evening of their arrival. Majors said he would see Butler and, on his return from seeing Butler next morning, he told Mrs. Walsh that the only way for her to get any money was for her to sell her interest to him; that he thought he could borrow $450 or $500. Majors at this time told her that "after paying all the bills and selling the property, whatever was left over we were to divide 50-50"; that the expenses of administration, debts, and cost of moving his wife's body to a niche in San Jose from her place of temporary burial in Watsonville were such that it was doubtful if there would be $1,000 left and he doubted whether he would get back the $500 he was going to pay plaintiff. The Walshes then accompanied Majors to Butler's office where, according to their testimony, substantially the same statements were made by Butler, that is, that there would be practically no estate left after the bills and expenses had been taken care of, and Butler repeated that it was doubtful whether Majors was making a good deal. Nothing was said about the value of the realty itself, but the impression was given that it would not sell because it was not good income property and because of the state of the market. Butler admits having told Mrs. Walsh the value of the property after all the debts were paid would be a little over $1,000. Mrs. Walsh signed the agreement and was given $25 by Majors. Both Mrs. Walsh and her husband testified that she asked Butler whether she should have another lawyer and he replied that she need not unless she did not trust him. Mrs. Walsh later went back to Butler's office with Majors and received the remaining $475 and executed the assignment. It thus appears that, while the evidence outlined will support a finding of false and fraudulent statements to the effect that plaintiff's interest was one-half the sum remaining after all debts and expenses had been paid, which sum would probably not exceed $1,000, made by Majors and Butler for the purpose of inducing her to dispose of her interest to Majors for a grossly inadequate consideration, it will not support the finding that they represented to her that the true value of the real property did not exceed $1,000.

[1] Appellants contend that there is a failure of proof in that the misrepresentations proven are not the misrepresentations alleged in the complaint. It is true that the complaint charged a misrepresentation as to the value of the realty in which plaintiff had been left an interest by her sister's will and the proof showed representations as to the nature and value of plaintiff's interest in her sister's estate. The matter proven so closely approximates the matter alleged that defendants cannot have been misled thereby, hence the variance cannot be considered material. No objection was made on this ground and, had objection been made, the complaint could have been amended to conform to the proof. The representations were admitted by the defendants, and the only questions left for the trial court were their falsity, the defendants' knowledge of their falsity, and plaintiff's reliance thereon, all of which questions were resolved by the trial court in favor of the plaintiff.

[2, 3] Appellants insist that the finding that the reasonable value of the real property is $5,000 and that it could have been sold for $5,000 is not supported by the evidence. Kallam, a real estate dealer in Watsonville, testified that in his opinion $1,750 to $2,000 was its true market value, both in 1931 and at the time of trial. Majors testified he bought it for $1,600 in 1923 and had twice tried to sell it without success, and W. H. Daley testified that he had, as agent for a laundry, offered Majors $5,000 for it in October or November of 1931. Appellants object that offers to buy or sell are inadmissible to prove value. In this contention the appellants are undoubtedly correct. However, the testimony of Daley was offered and received without objection. Its weight is a question for the trial court. A similar argument of appellants is that the appraisal of the real estate in the estate proceedings at a value of $5,000 is not evidence of value. It is only necessary to point out that the papers in the estate proceedings were not admitted to prove the value of the property.

Appellants next complain of the finding that, by the terms of the will, plaintiff got all wearing apparel, and that at the time of her death decedent was the owner of two fur coats of the estimated value of $2,000; that after her death and while in the possession of the defendant Majors, they were destroyed by fire and at that time were reasonably worth $750; and that the proceeds of the fire insurance covering furniture, wearing apparel, and fixtures in the Majors' home was paid into the estate and distributed to Majors. The argument is made that, since the only evidence on the subject is the testimony of Majors that his wife gave him the coats about a month before her death to dispose of as he wished and the only evidence of value, aside from the claim presented to the insurance company, is Majors' testimony that he bought them for $150 and $50, the finding is totally unsupported. The court expressly stated that it did not believe Majors' story of the gift of the coats, which was his only explanation for his failure to include them in the assets of the estate. Hence it follows that they still belonged to Mrs. Majors at her death and passed under the will to the plaintiff. This conclusion is further supported by the fact that the insurance money, which was in part obtained for the loss of the coats, was all paid into the estate and listed in the first and final account and petition for distribution. As to the value of the coats, Majors testified when new were $750 and $2,000, that they were three or four years old at the time they were destroyed by fire, and that he put in claims for them with the insurance company valuing them at $1,750 and $750. Majors' statements regarding the circumstances under which he purchased the coats indicate that they were purchased at what amounted to forced sales and for far less than their actual value, from persons who had to dispose of them in great haste. They were both purchased secondhand.

[4] The contention of appellants that finding IX with respect to representations that the wearing apparel of decedent did not exceed $25 in value is not supported by the evidence must be sustained. There is a complete absence of proof of any such representation. However, this erroneous finding does not prejudice the appellants' rights nor necessitate a reversal of the judgment, as will hereafter appear.

Appellants seek to show that plaintiff did not, as found by the court, believe and rely upon these various representations, by pointing to evidence that she knew the contents of her sister's will and that she considered the $3,000 valuation put upon the realty by Butler as too low, because her sister had told her she had refused $4,750 for it and was holding it for $7,000. We have already held that the finding of misrepresentations of the value of the realty is not sustained by the proof. Knowledge of the value of the realty and of the contents of the will does not affect plaintiff's reliance upon repeated statements made to her by her brother-in-law and the executor of her sister's estate, both of whom were in a much better position than the plaintiff to know the actual state of affairs, that her interest was not determinable until all debts, funeral expenses, and costs of administration had been met and that probably the estate would not net more than $1,000. These statements of the defendants were reinforced by a discussion of specific expenses such as $1,500 for interring the deceased, and by statements that Majors was making a gamble in paying her $500 for her interest. Defendant Butler insists that this is a misrepresentation of law, at most. It is a misrepresentation of the nature and value of plaintiff's interest, even though the reasons given for its small value may have involved misrepresentations of law.

[5] The record as a whole, as well as the findings and evidence just discussed, amply support the conclusion that both Majors and Butler falsely represented to the plaintiff that her interest in the estate of her sister was half of the residue after all expenses had been met, which in all probability would not amount to $500, whereas she was entitled under the will to one-half the proceeds of the sale of a specific piece of realty, which interest was reasonably worth $2,500; that Majors concealed and appropriated the two fur coats to which plaintiff was entitled under her sister's will and that Butler either connived with Majors in their concealment or was derelict in his duty as executor in not making an investigation and inventory of the assets of the estate and taking proper precautions for their preservation, which was a breach of his fiduciary relationship to plaintiff as a legatee under the will; that, because of the fraud of the defendants and in reliance upon their representations and upon the assurances of Butler that as executor of the estate he would look after her interests, the plaintiff was induced to part with her interest in the estate for the grossly inadequate sum of $500; and that by means of this assignment defendants procured the distribution of the entire estate to the defendant Majors.

[6] Turning to the pleadings, it is clear that the plaintiff attempted to state a cause of action for equitable relief from a decree of distribution obtained by fraud, seeking to have the defendants declared to be involuntary trustees of that which they had gained by the fraud and, as alternative relief, alleged she had been damaged in the sum of $4,000 and asked for an award of damages in that amount. Equitable jurisdiction to grant relief from fraudulently obtained judgments and orders in probate by declaring the beneficiary a trustee for those defrauded is well settled. Caldwell v. Taylor, 218 Cal. 471, 23 P.(2d) 758, 88 A. L. R. 1194, and cases there cited.

[7, 8] That the case was tried upon the theory of a constructive trust appears from the statement of the defendant Butler, who appeared as attorney for himself and his codefendant Majors. It is now contended that no cause of action in equity for the rescission of the assignment has been stated because it is not alleged that, prior to the suit, the plaintiff restored or offered to restore the consideration received by her, nor does the complaint itself contain such an offer. Under the circumstances we do not consider such failure fatal to the cause of action the plaintiff has attempted to set forth. This same objection was made in More v. More, 133 Cal. 489, 65 P. 1044, 66 P. 76, where the defendants conspired together to fraudulently acquire the interest of the incompetent plaintiff in the estate of his father and deeds were procured in pursuance of the conspiracy. No attempt to rescind was made prior to suit, although an offer to restore was made in the complaint. The court there held that rescission is only one of the remedies in case of fraud, that the most common relief is for a court of equity to declare the defrauding party an involuntary trustee of the property obtained by fraud and that the rigid rules with regard to restoration of the consideration prior to suit apply only to rescission by act of the parties, the power of a court of equity to cancel a fraudulent contract upon appropriate terms and condi-

tions being much broader, although the court may refuse to exercise its power for failure of the injured party to exercise his right to rescind. Exceptions to the general rule that one seeking rescission in equity must as a condition precedent to action promptly rescind and restore or offer to restore what he has received are cases in which by reason of special circumstances it has on general equitable principles become unfair to impose such a condition of relief. California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593. The circumstances of the instant case have been recognized as creating an exception. The plaintiff has received nothing to which she was not entitled independently of the contract and the defendant Majors has received from the trust estate more than the amount paid by him to the plaintiff as consideration in the original transaction. Moreover, the defendant is unable to return a portion of that which he received, the coats having been destroyed by fire. Gatje v. Armstrong, 145 Cal. 370, 78 P. 872; Hilton v. Hilton, 54 Cal. App. 142, 201 P. 337; Richards v. Farmers' Bank, 7 Cal. App. 387, 94 P. 393. In this situation the claim of the defrauding party will be treated as extinguishing, as far as it will go, the claim of the defrauded plaintiff. Gatje v. Armstrong, supra. The judgment has allowed the $500 paid by Majors to the plaintiff as a set-off against the $750 awarded as damages for the coats.

[9] A judgment against the estate of the defendant Joseph A. Majors declaring him a trustee for the property wrongfully received under the decree of distribution, directing a conveyance thereof to the plaintiff, or, if this cannot be had, holding him responsible for its value, is clearly correct. Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98. Appellants complain, however, that the judgment in the instant case does more than direct the return of the property received or its value in that it directs a conveyance of an undivided half interest in the real property "free and clear of encumbrances." Their contention is that this direction should be limited to encumbrances placed upon the property by Majors after his wife's death. It appears that the property was mortgaged at the death of Mrs. Majors but that the mortgage loan was fully discharged within a few months of her death and before distribution, the payments being made from the rental received from the property. It does not appear that there were other encumbrances at the time of her death, but if any such existed the plaintiff should take subject thereto.

By the judgment the defendant Butler was made liable with the estate of Joseph A. Majors for $2,500, the value of an undivided one-half interest in the real property, if conveyance could not be had, and $750, the value of the coats, minus $500, the consideration paid for the assignment. Both sums were made a lien upon the real property prior to the lien of the Butler mortgage.

The postponement of Butler's mortgage lien is correct, either upon the theory that he has in his hands, as alleged in the complaint, that portion of the assets of the estate to which plaintiff was entitled as the fruit of his fraud, or upon the theory that by reason of his participation in the fraud he is not a bona fide encumbrancer, but took with knowledge of the trust for plaintiff.

Butler's liability for the value of an undivided half of the real property if it cannot be conveyed and for the value of the fur coats must rest upon a different basis. Admittedly the entire estate was distributed to Majors. Butler cannot therefore be charged as a constructive trustee, but must be held in damages for deceit. Any damage suffered by the plaintiff must, it is apparent, be contingent upon the failure or inability of the estate of Joseph A. Majors to return to the plaintiff the property which was wrongfully distributed to Majors. In this connection it is argued that, having asked that the assignment be declared void and for a restoration of that with which she had parted by the assignment, it is not open to the plaintiff to ask for damages for the fraud, that rescission and an action for damages are independent remedies and the plaintiff must elect which to pursue.

[10, 11] In an equitable action for rescission of a contract on the ground of fraud the plaintiff may state the facts surrounding the transaction and pray for any and every kind of relief to which under the facts he may show himself entitled, including a claim for damages. It has been held in such a situation that when the jurisdiction of equity attaches for any purpose it attaches for all purposes, among others, for assessing and awarding damges where damages are proper, as where

rescission has become impossible; it being the duty of a court of equity to adjust all the differences arising from the cause of action presented and to leave nothing for further litigation. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964; Murphy v. Sheftel, 121 Cal. App. 533, 9 P.(2d) 568. We see no essential difference between those cases and the course pursued by the plaintiff. She has asked to have the fraudulent distributee declared a trustee of the property which he obtained by the fraud of himself and Butler; she also asks for damages in the sum of $4,000 and for other and further relief on the facts. There is nothing inconsistent in asking for restoration of the property by the defendant who wrongfully received it and, if this is impossible, a judgment for damages against both defendants whose fraud caused the loss, and the court may grant any relief embraced within the issues and consistent with the case made by the complaint.

[12, 13] The trial court imposed a lien upon the real property for the value of the coats less the amount of the consideration received by the plaintiff. This was improper. Since the realty was distributed to Majors at the same time as the proceeds of the insurance policy upon the coats, there is no possibility that the trust funds were used in the acquisition of the realty, nor is there any proof that they were used in improvements or paying off encumbrances or in any way applied upon the realty. The equitable lien of the beneficiary depends upon his being able to trace the trust property into the particular property against which he seeks to enforce the trust, or a commingling with the fund upon which he asserts his lien. Some degree of identification with the property which he seeks to subject to his claim is essential. Pomeroy's Equity Jurisprudence, vol. 3, § 1058, p. 2420; Mitchell v. Dunn, 211 Cal. 129, 294 P. 386.

In accordance with the conclusions the judgment is modified by striking therefrom the provision that the plaintiff shall have a lien on the real property for the value of the fur coats less the amount of the consideration received by her. As so modified, the judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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9 Cal.App.2d 287

STATE GUARANTY CORPORATION v. RICHARDSON, State Building and Loan Com'r.

Civ. 9495.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1935.

1. Landlord and tenant 🔑200(2)

Where lesser amounts than ones provided for under lease were accepted under oral agreement as rent in full for period covered by amounts, no rent claim could thereafter be maintained for period covered by such payments.

2. Evidence 🔑445(3)

Oral agreement for reduction of rent stipulated in lease *held* inapplicable as to monthly installments not actually paid, and hence liquidator of sublessee was liable to landlord for full rent for months during which leased premises were occupied.

3. Landlord and tenant 🔑49(3)

Where state building and loan commissioner as liquidator of loan society vacated premises occupied by society as sublessee, landlord *held* not entitled to recover as damages difference between rental reserved for unexpired term and reasonable rental value of premises at time of repudiation, especially where subsequent lease was entered into with another party for portion of unexpired term.

4. Landlord and tenant 🔑109(4)

Where state building and loan commissioner as liquidator of loan society vacated premises occupied by society as sublessee, landlord, who re-entered premises and made lease to another without notifying commissioner that such lease was for commissioner's account, accepted surrender of lease and terminated relation of landlord and tenant.

◆

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by the State Guaranty Corporation against Friend W. Richardson, as State Building and Loan Commissioner. From a judgment, plaintiff appeals.

Affirmed.

John L. Mace and Roy D. Reese, both of Los Angeles, for appellant.

E. S. Williams, of Los Angeles, for respondent.

GOULD, Justice pro tem.

When the building and loan commissioner of the state of California undertook to liquidate the affairs of American Loan Society, the latter was occupying certain premises by virtue of a long-term sublease with plaintiff. The commissioner continued occupancy of said leased premises one month, and then vacated the same with notice to plaintiff that he did not assume the lease. Plaintiff then presented a claim to American Loan Society in liquidation, demanding (1) accrued rental of $6,600, which was allowed in the sum of $750 only, and (2) damages of $181,315, which was disallowed.

[1] 1. As to the $6,600 claim, it appears that the lessor had accepted $750 instead of the contracted $1,665 a month for some period previous to the advent of the liquidating commissioner, and a greater portion of the $6,600 was alleged to be due for the unpaid difference between the amount fixed by lease and the amount accepted. Where, as here, lesser amounts were accepted as rent in full for the period covered by them, the oral agreement for reduction of rent was executed and therefore valid, and no claim thereafter can be maintained for the period covered by said payments. Julian v. Gold, 214 Cal. 74, 3 P.(2d) 1009.

[2] As to the monthly installments not actually paid, the oral agreement was not applicable; and, although defendant as liquidating commissioner had allowed the claim on the basis of only $750 per month, the trial court correctly adopted the figure fixed by the lease at $1,665 per month as the proper one for rent allowance. Stoltenberg v. Harveston, 1 Cal.(2d) 264, 34 P.(2d) 472. The recovery allowed by the court—$1,665 for the last month of occupancy and a like sum for the next succeeding month after the notice of surrender of the premises, a total of $3,300—is the maximum which plaintiff may recover.

[3] 2. Plaintiff's claim for $181,315 is based upon the theory that that sum represents the damages suffered when the lease was repudiated, being the difference between the rental reserved for the unexpired term and the reasonable rental value of said demised premises for said unexpired term at the time of repudiation. Such a claim for anticipatory damages, uncertain and speculative in the highest degree, may not be maintained. Even assuming that the lessor re-entered the premises with intent to relet them for the account of the lessee, any action for damages for the entire unexpired term is premature if brought before the expiration of said term, especially when, as here, a subsequent lease was entered into with another party for a portion only of said unexpired term. Treff v. Gulko, 214 Cal. 591, 7 P.(2d) 697. In a case similar to the one at bar, but involving a liquidation under the Bank Act (Pacific States Corporation v. Rosenshine, 113 Cal. App. 266, 298 P. 155), this court has held that there may be no recovery of damages in such circumstances.

[4] Furthermore, the facts in this case justify the findings of the trial court that, when the premises were surrendered by the commissioner, the lessor by his re-entry and subsequent conduct, including the making of a lease to another party without notifying defendant that it was being done for his account, accepted the surrender of the lease and terminated the relation of landlord and tenant. All liability under the lease was thus terminated and discharged, except the single liability for rent due and unpaid at the date of the re-entry. Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am. St. Rep. 145.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 300

ABE v. FISH AND GAME COMMISSION OF CALIFORNIA et al.

Civ. 1918.

District Court of Appeal, Fourth District, California.

Sept. 27, 1935.

Hearing Denied by Supreme Court Nov. 25, 1935.

Constitutional law 🔑230(1)
Licenses 🔑7(6)

Statute requiring persons bringing fish caught on high seas outside territorial jurisdiction of California into California to obtain license, and providing that license could not be obtained by nonresidents, constituted an unequal exaction and imposed greater burden upon nonresidents than was imposed upon residents in same calling and under same conditions, and was violative of federal constitutional guaranty of equal protection of laws (St. 1933, p. 479, § 990; Const. U. S. Amend. 14).

* * *

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for injunction by T. Abe against the Fish and Game Commission of the State of California and others. From a judgment for plaintiff, the defendants appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for appellants.

Harrison G. Sloane and Fred A. Steiner, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for injunction to restrain the defendants from molesting the plaintiff and the members of the crew of his fishing boat and from preferring against them any charges under the provisions of section 990 of the Fish and Game Code. Stats. 1933, chap. 73, p. 479.

The complaint alleged that the plaintiff is the owner of a certain fishing boat Osprey, which for two years he had used in taking fish from "ocean waters outside of the State of California and beyond the jurisdiction thereof and in bringing the same ashore within the State of California for the purpose of selling the same in a fresh state"; that the plaintiff is the holder of a commercial fishing license and is willing to comply with all laws and regulations in so far as he can; that the plaintiff required and had the services of a crew of six persons, but that none of said crew had resided continuously within the United States for a period of one year last past, and none was eligible to procure a commercial fishing license under the Code section above referred to; that the defendants had threatened to and would, unless restrained, institute proceedings charging the plaintiff and his crew with violating section 990 of said Code; and that said Code section is in violation of the Constitution of the United States and the State Constitution of California. A demurrer was overruled, and, the defendants declining to answer, judgment was entered in favor of the plaintiff, from which judgment the defendants have appealed.

The main and, we think, the decisive question here presented, is whether this section of the Fish and Game Code violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution in requiring a license of every person who assists in the bringing of fish caught on the high seas into this state, for the purpose of selling the same in a fresh state, and in limiting the issuance of such license to persons who have continuously resided in the United States for a period of one year.

The appellants frankly concede that this statute is discriminatory, but argue that it is such a discrimination as is permissible, relying on the case of Lubetich v. Pollock (D. C.) 6 F.(2d) 237, 240. In that case the court considered a statute of the state of Washington making it unlawful for any person to take fish from any waters within the jurisdiction of the state unless such person was a citizen of the United States or had declared his intention to become such, and unless he possessed certain residence requirements. The statute was upheld on the ground that all fish within the waters of the state belonged to the people of the state in common, that the power to dispose of such fish was incidental to the ownership of the property, and that in dealing with its own property and permitting it to be converted into private ownership the state was authorized to prescribe the terms and conditions upon which this might be done. While the right of the state to thus deal with its own property was upheld, the court there said: "Obviously it is a denial of the equal protection of the laws when a lawmaking body, regulating, not its own property, but private business, undertakes to deny to aliens the right to engage in lawful trade or labor."

We are not here concerned with the right to prohibit any person from bringing fish or game, no matter where taken, into a state or into a particular district during a closed season in which such fish or game may not lawfully be taken within such state or district. See New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; Johnson v. Gentry, 220 Cal. 231, 30 P. (2d) 400, 92 A. L. R. 1264.

The case of Booth v. Lloyd (C. C.) 33 F. 593, 597, involved a statute enacted by the state of Maryland providing that no person should employ any vessel to carry, buy, or sell oysters on the waters of Chesapeake Bay without first obtaining a license, and that no one could obtain such a license unless he had been a resident of the state for twelve months. Certain of the plaintiffs who were citizens of the state of Illinois had applied for such a license, which was refused to them. A boat upon which they were transporting oysters was seized and in its opinion, in the action which followed, the court said:

"The law invoked as the justification of the seizure is, in our opinion, unconstitutional, because it denies to citizens of other states privileges and immunities granted to citizens of Maryland, in a matter to which that clause of the federal constitution is applicable. A state cannot discriminate, by tax or license, between the goods or merchandise of home manufacture as against those produced in other states. Welton v. Missouri, 91 U. S. 275 [23 L. Ed. 347]; Tierman v. Rinker, 102 U. S. 123 [26 L. Ed. 103]; Webber v. Virginia, 103 U. S. [344], 345 [26 L. Ed. 565]. Nor can a state impose a tax or license upon a non-resident trader different from that imposed upon a citizen or resident trader. Ward v. Maryland, 12 Wall. 418 [20 L. Ed. 449]."

It has been held in this state that a city ordinance fixing a higher license for nonresidents than that required of residents engaged in the same line of business is discriminating and not founded upon any reasonable ground of classification. In re Hines, 33 Cal. App. 45, 164 P. 339; In re Hart, 36 Cal. App. 627, 172 P. 610.

The general rules with respect to the equal protection clause of the Federal Constitution are discussed in the case of In re Kotta, 187 Cal. 27, 200 P. 957, 958, in which a statute imposing a poll tax on aliens was held to be invalid. In that case, the court said:

"The meaning of 'the equal protection of the laws' thus guaranteed by the federal Constitution to every person within the jurisdiction of a state is not left in doubt by the decisions in so far as such an act as the one here involved is concerned. In Yick Wo v. Hopkins, supra [118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220], it is said that 'the equal protection of the laws is a pledge to the protection of equal laws.' This was approvingly quoted in Truax v. Raich, supra [239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283]. In Barbier v. Connolly, 113 U. S. 27, 31, 5 S. Ct. 357, 359, 28 L. Ed. 923 [see, also, Rose's U. S. Notes], the Supreme Court of the United States declared that it was undoubtedly intended thereby: 'That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and * * * enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; *that no greater burdens should be laid upon one than are laid upon others in the same calling and condition,*' etc. (Italics ours.) As is shown by the opinion in Yick Wo v. Hopkins, supra, the legislation enacted by Congress for the enforcement of the amendment, popularly known as the civil rights statutes, declared that—'All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens *and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.*' (Italics ours.) What is said in Barbier v. Connolly, supra, and the federal statute just quoted sufficiently shows the subject-matter as to which the alien inhabitant is given by the Constitution 'a pledge of the protection of equal laws,' laws free from discrimination based solely on his alien character. Stated very generally, the requirement is for equal protection and security for all, citizens and aliens alike, under like circumstances in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc. As is stated in the opinion in Truax v. Raich, supra, the constitutional guaranty, in so far as an alien is concerned has no application to laws of a state relating to such matters as the regulation or distribution of the public domain or of the common property or resources of the people of the state, or, it is suggested, laws relating to the devolution of the real property therein. See Truax v. Raich, 239 U. S. [33], 39, 40, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283. But that it does guarantee the alien 'equal laws' in the matter of the imposition of such burdens on him and his property as taxes seems clear. No question of discriminatory taxation laws was directly involved in the decisions of the Supreme Court that we have cited but the rule of these decisions is clearly applicable to such a case. In the Railroad Tax Cases (C. C.) 13 F. 722, Justice Field, in his opinion in the Circuit Court, said: 'The Fourteenth Amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. * * * Unequal exactions in every form, or under any pretense, are absolutely forbidden, and of course unequal taxation, for it is in that form that oppressive burdens are usually laid.' See, also, Fraser v. McConway, etc., Co. (C. C.) 82 F. 257; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 A. 977, 42 L. R. A. 442, 67 Am. St. Rep. 579. This is so clearly true, in view of the general principles declared by the United States Supreme Court in the cases we have cited, as not to require discussion. Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is, all those among whom no difference 'which bears a reasonable and just relation' to the matter exists (Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 155, 17 S. Ct. 255, 257, 41 L. Ed. 666 [see, also, Rose's U. S. Notes], exempting their remaining portion from the burdens, are not 'equal laws,' and their enforcement would deprive the persons so burdened of the equal protection of the laws. We do not see how this can be fairly questioned.

"That the act does this very thing is clear. The sole distinction between the male inhabitants of California so burdened with the poll tax and those not so burdened, in so far as all matters material to imposition of the tax is concerned, is that the former are aliens and the latter citizens. This is the sole basis of the attempted classification. As was said in Gulf, etc., Ry. Co. v. Ellis, supra, 165 U. S. [150], 165, 17 S. Ct. [255], 261, 41 L. Ed. 666 [see, also, Rose's U. S. Notes]: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' In the case at bar the only difference is such that, in view of the language of section 1 of the Fourteenth Amendment relative to equal protection of the laws, it cannot in the nature of things constitute a proper basis for classification; for the plain effect of that section is to forbid any distinction in such a matter as this based on that fact alone."

The principles of these cases are especially applicable here. The requirement for a commercial fishing license, as applying to persons bringing in fish caught upon the high seas, with the further provision that such a license cannot be obtained by a nonresident, constitutes an unequal exaction and a greater burden upon persons of the class named than that imposed upon others in the same calling and under the same conditions. In fact the discrimination thus attempted is much more onerous than a mere inequality in taxation, amounting, as it does, to an absolute prohibition. The statute clearly attempts to discriminate against nonresidents in this particular line of work, the only classification attempted being upon the basis of residence. In so far as we are here concerned with this statute, this is not a reasonable ground of classification and it follows that the statute is, to that extent, in violation of the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States. It is to be understood that we are not here concerned with any question relating to fish caught or taken in any of the waters within the territorial jurisdiction of the state.

We conclude that section 990 of this Code is void and ineffective in so far as it discriminates between residents and nonresidents of this state with respect to the bringing into the state of fish caught upon the high seas and outside the territorial jurisdiction of this state, and that the demurrer to the complaint was properly overruled.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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9 Cal.App.2d 237

PEOPLE v. TODD.

Cr. 1840.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1935.

Hearing Denied by Supreme Court Oct. 24, 1935.

1. Perjury 🔑36

Controlling question to be determined by jury in perjury prosecution is whether oath is in fact false (Pen. Code, § 118).

2. Perjury 🔑34(1)

Statutes requiring guilt of person accused of perjury to be established by testimony of two witnesses or testimony of one witness and corroborating circumstances are based largely upon principle that it would be unsafe to find one individual guilty of swearing falsely solely upon oath of another (Pen. Code, § 1103a; Code Civ. Proc. § 1968).

3. Perjury 🔑34(5)

Corroborative evidence necessary to prove perjury may be circumstantial as well as direct, and where accused testifies in his own behalf, requisite corroboration may be supplied by his own testimony or be gathered from his conduct and attitude while so testifying as witness (Pen. Code, §§ 118, 1103a; Code Civ. Proc. § 1968).

4. Perjury 🔑34(4)

Law governing character of corroborative circumstances in perjury prosecution is same as that governing character of corroborative circumstances in case where guilt of an accused is sought to be established by testimony of an accomplice, so that corroborative evidence need not be strong, nor even be sufficient in itself without aid of other evidence, to establish the fact (Pen. Code, §§ 118, 1103a; Code Civ. Proc. § 1968).

5. Perjury 🔑34(6)

Circumstances legally sufficient to sustain conviction for perjury may consist of extrajudicial statements, declarations, admissions, or confessions of accused, his silence in face of accusatory statements, or where he voluntarily becomes witness in his own behalf, it may be gathered from his own testimony or conduct and attitude as witness (Pen. Code, §§ 118, 1103a; Code Civ. Proc. § 1968).

6. Perjury 🔑34(6)

Conduct of person accused of perjury in becoming witness in her own behalf and as such failing to deny falsity of statements she had admittedly sworn to or to contradict testimony given by prosecution's witnesses and in attempting to exculpate herself from criminal responsibility on claim statements were made by mistake *held* interpretable as corroborative proof of falsity of such statements (Pen. Code, §§ 118, 1103a; Code Civ. Proc. § 1968).

7. Perjury 🔑34(5)

In prosecution for perjury, evidence that immediately following indictment of defendant, and knowing she had been indicted, she disappeared from her residence and usual whereabouts and fled to another city *held* interpretable as corroborative proof of falsity of statements (Pen. Code, §§ 118, 1103a; Code Civ. Proc. § 1968).

8. Criminal law 🔑568

Motive and design to commit a crime, if proved, may be considered a guilty circumstance, and, consequently, may serve legally as corroborative evidence.

9. Criminal law 🔑372(1)

Where it is claimed that several offenses have been committed as part of one scheme or plan, all of same general character, tending to same common end, evidence thereof may be received to show process or motive and design to commit particular offense with which accused is charged and as tending to show logically that particular offense was part of such common scheme.

10. Perjury 🔑34(4)

In prosecution for perjury consisting of taking of false oaths to affidavits attached to petitions circulated by accused in behalf of political party to enable it to participate in primary election, evidence as to flight of accused immediately following indictment and of commission of three like offenses of same general character and tending to same common end *held* sufficient corroboration of falsity of statements (Pen. Code, §§ 118, 1103a; Code Civ. Proc. § 1968).

11. Perjury 🔑36

Whether false swearing of party accused of perjury was result of honest mistake or had been committed willfully, knowingly, and corruptly *held* for jury (Pen. Code, § 118).

12. Criminal law 🔑1159(4)
Where jury had found against party accused of perjury on her claim, based entirely upon her own testimony, that falsity of statements had been result of an honest mistake, District Court of Appeal could not interfere with such conclusion, since jury was sole judge of credibility of witnesses and facts of case (Pen. Code, § 118).

13. Perjury 🔑11(2)
False statements made and sworn to before deputy registrar of voters by person accused of perjury, to effect that she was person who had solicited signatures to attached petitions in behalf of political party to enable it to participate in primary election, and that all signatures to petitions were made in her presence and upon dates shown, and were solicited by her, *held* material within meaning of perjury statute, since in absence of such statements petitions would have been rejected (Pen. Code, § 118; St. 1929, p. 121, § 1, par. 9 (c); Const. art. 4, § 1).

14. Criminal law 🔑29
That party accused of perjury in taking of false oaths to affidavits attached to petitions circulated by her in behalf of political party to enable it to participate in primary election might have been proceeded against under statute pertaining to crimes against elective franchise *held* not to bar prosecution under perjury statute (Pen. Code, §§ 64b (5), 118).

15. Criminal law 🔑829(1)
Refusal to give requested instruction *held* not prejudicial where substance of instruction was given in other instructions.

16. Criminal law 🔑1030(1)
Accused *held* not entitled to have considered as matter of right on appeal an additional point not before presented.

17. Criminal law 🔑1170½(2)
Overruling of objections to questions propounded to accused on cross-examination *held* not prejudicial error, even if objections were improperly overruled, where answers were favorable to accused.

Appeal from Superior Court, City and County of San Francisco; I. R. Harris, Judge.

Louise Todd was convicted of perjury, and she appeals.

Affirmed.

Geo. R. Anderson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The grand jury of the city and county of San Francisco indicted the appellant, Louise Todd, for the crime of perjury. The indictment contained four counts, and each count charged a separate offense. Subsequently one of the counts was dismissed, and upon trial a jury found her guilty on the remaining three. The present appeal was taken from the judgments of conviction and the order denying the motion for new trial. One of the grounds urged for reversal is that the guilt of appellant was not established by the testimony of two witnesses or the testimony of one witness and corroborating circumstances. Pen. Code, § 1103a; Code Civ. Proc. § 1968. We find no merit in the point.

The alleged perjury consisted in taking false oath to affidavits attached to three petitions circulated by appellant in behalf of an organization known as the Communist Party, to enable said organization to participate in the state primary election held throughout the state on August 28, 1934. The affidavits were sworn to by appellant before a deputy registrar of voters of said city and county, and the petitions were eventually forwarded to and filed with the secretary of state pursuant to the state election laws. The oaths embodied in said affidavits and so sworn to by appellant were in the form prescribed by law, identical in their wording, and the material statements set forth therein were as follows: "* * * I am the person who solicited the signatures to the attached and foregoing petition; all the signatures to the attached section were made in my presence and upon the date shown after each signature and were solicited by me within the above named County (or City and County) of San Francisco. * * *" Attached to one of the petitions was the signature of Rozellah Moll; another was signed by Wilhelm Noack, and a third bore the signature of Walter Rossi; and appended to each signature was the residential address of the voter and certain numerals indicating the date of signing, and all of said persons were produced as witnesses at the trial and testified positively, in contradiction of the statements made under oath by appellant, that their signatures had not been solicited by her, that they had not signed the petitions in her presence, and that so far as they know they had never seen her prior to the day on which they testified in court. In so testifying Rozellah Moll stated that her signature was solicited by a young man at the Civic Center, that the petition was presented to her by him, and she signed in his presence. Noack testified that his signature was solicited by two men on Powell street, in the North Beach district, that they handed him the petition and he signed in their presence; and Walter Rossi declared that his signature was solicited and the petition was presented to him by, and he signed in the presence of a man with whom he had a passing acquaintance, who falsely represented to him at the time that the petition related to the Hetch Hetchy water system and to some street improvements out in the Mission district. Rossi further testified that in signing said petition he abbreviated his given name thus "Wal," and that the letters "ter" had been subsequently added by someone without his knowledge; also that the word "Fillmore" designating his street address had been subsequently inserted by some other person. Appellant was the sole witness in her own behalf and as such made no attempt whatever to deny the falsity of the statements so made by her under oath, nor otherwise to refute the truth of the testimony given by the three witnesses above mentioned. Moreover, so far as the record shows, it was nowhere claimed throughout the trial, nor is it contended on this appeal, that said statements are true. The substance of appellant's testimony was, as will hereinafter more particularly appear, that the false swearing on her part was the result of a mistake due to confusion in handling the petitions at the Communist headquarters in San Francisco.

[1-5] As will be noted from the Code definition of perjury (Pen. Code, § 118), the controlling question to be determined by the jury in such cases is whether the oath is in fact false; and the rule requiring corroboration dates back to the common law, the reason for the rule being that under the common law an accused was not permitted to testify in his own behalf. 1 Greenleaf on Evidence, § 257; State v. Miller, 24 W. Va. 802. The modern statutes exacting the same degree of proof are but the enactment of the common-law rule, and are based largely upon the principle that it would be unsafe to find one individual guilty of the crime of swearing falsely solely upon the oath of another, and that consequently, in order to counterbalance the oath of the accused and the presumption of his innocence, there should be something more than the testimony of one witness. People v. Galbraith, 66 Cal. App. 761, 226 P. 983; Commonwealth v. Davis, 92 Ky. 460, 18 S. W. 10. However, corroborative evidence, which is defined by the Code to be additional evidence of a different character, to the same point (Code Civ. Proc. § 1839), may be circumstantial as well as direct (People v. Blunkall, 31 Cal. App. 778, 161 P. 997), and it is held that where, as here, the accused avails himself of the right to testify in his own behalf, the requisite corroboration may be supplied by his own testimony (People v. Watson, 21 Cal. App. 692, 132 P. 836), or be gathered from his conduct and attitude while so testifying as a witness (State v. Miller, supra). As said by the court in the case last cited, the manner in which the accused testifies and the unreasonableness of his story may serve as the strongest kind of corroborative evidence. In other words, as pointed out by the decisions of this state, the law governing the character of corroborative circumstances in a case of perjury is the same as that governing the character of corroborative circumstances in a case where the guilt of an accused is sought to be established by the testimony of an accomplice (People v. Follette, 74 Cal. App. 178, 240 P. 502; People v. Woodcock, 52 Cal. App. 412, 199 P. 565), and that being so, the corroborative evidence need not be strong, nor even be sufficient in itself without the aid of other evidence to establish the fact. People v. Tinnin, 136 Cal. App. 301, 28 P.(2d) 951; People v. Martin, 19 Cal. App. 295, 125 P. 919; People v. Davis, 210 Cal. 540, 293 P. 32. The circumstances legally sufficient to sustain a conviction may consist of the extrajudicial statements, declarations, admissions, or confessions of the accused (People v. Albert, 91 Cal. App. 774, 267 P. 587; 8 Cal. Jur. 180); his silence in the face of accusatory statements (People v. Tinnin, supra; People v. Taylor, 70 Cal. App. 239, 232 P. 998); or, as stated, where he voluntarily becomes a witness in his own behalf, it may be gathered from his own testimony (People v. Watson, supra) or his conduct and attitude as a witness (State v. Miller, supra).

In fact, as declared in People v. Nikolich, 93 Cal. App. 356, 269 P. 721, and again in People v. Tinnin, supra, the entire conduct of the accused may be looked to for corroborative circumstances.

[6] It follows, therefore, that inasmuch as appellant availed herself of the right to become a witness in her own behalf, and as such made no pretense whatever to deny the falsity of the statements she admittedly swore to, nor even indirectly to contradict the testimony given by the prosecution's witnesses, nor otherwise to substantiate the truth of said statements, but, on the contrary, claimed that they were made by mistake and attempted to exculpate herself from criminal responsibility therefor upon that ground, it was within the province of the jury, under the law of the cases above cited, to interpret such conduct and attitude, and the testimony she gave, as corroborative proof of the falsity of the statements in question.

[7] Furthermore, evidence showing a consciousness of guilt, such as flight, may serve as a requisite corroborative circumstance (People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Ciani, 104 Cal. App. 596, 286 P. 459; People v. Mazzola, 99 Cal. App. 682, 279 P. 211); and evidence was adduced in the present case on the part of the prosecution from which the jury was justified in drawing the inference that immediately following the indictment of appellant, and knowing she had been indicted, she disappeared from her residence and usual whereabouts in San Francisco, in order to avoid arrest, and about a week later fled to Los Angeles, in which city she was arrested approximately three weeks later.

[8-10] It is also well settled that motive and design to commit a crime, if proved, may be considered a guilty circumstance (8 Cal. Jur. 35); and consequently may serve legally as corroborative evidence; and in this behalf it has been repeatedly held that where, as here, it is claimed that several offenses have been committed as part of one scheme or plan, all of the same general character, tending to the same common end, evidence thereof may be received to show the process or motive and design to commit the particular offense with which the accused is charged, and as tending to show logically that the particular offense for which he is being tried was part of such common scheme. People v. Cosby, 137 Cal. App. 332, 31 P. (2d) 218; People v. Robinson, 107 Cal. App. 211, 290 P. 470; 8 Cal. Jur. 69; People v. Francisco, 112 Cal. App. 442, 297 P. 34; People v. Barnes, 111 Cal. App. 605, 295 P. 1045; Wigmore on Evidence, § 357; Wharton's Criminal Law (10th Ed.) p. 73. From the foregoing, it is apparent that entirely aside from whatever inference the jury may have drawn from appellant's own testimony and her conduct and attitude as a witness, the evidence as to flight and that relating to the commission of three like offenses of the same general character and tending to the same common end furnished two additional independent elements of corroborative proof which of themselves were and are legally sufficient to satisfy the requirement of said Penal Code, § 1103a.

[11, 12] Appellant further contends that the evidence is insufficient to prove that she knowingly swore falsely to said affidavits. This contention is based entirely on her own testimony. In this regard she testified that after she obtained the signatures to the petitions she had been given to circulate she took them to the Communist headquarters in San Francisco to have the precinct numbers checked and inserted; that upon entering the room she laid the petitions on a table and said to the committee in charge, "These are mine"; that there were a number of other petitions left there also under similar circumstances by other solicitors; and that when she returned to get those she had circulated she picked up the petitions in question here from the table, at the place where she had previously placed the others, asked the committee if they were her petitions, and being informed that they were, she took them to the registrar's office and subscribed and swore to the oath attached thereto.

The question of whether the false swearing is the result of an honest mistake or has been committed willfully, knowingly, and corruptly is one of fact for the jury to decide (48 Cor. Jur. 907), and evidently the jury in the present case, as shown by its verdict, did not believe the story told by appellant. Therefore, since the jury is the sole judge of the credibility of the witnesses and the facts of the case, it is beyond the power of the reviewing court to interfere with the conclusions it has reached on this issue.

[13] Nor do we find any merit in the point that the false subject-matter of the

oaths "was not material to the issue." Penal Code, § 118 defining perjury declares that "Every person who, having taken an oath that he will * * * declare, depose, or certify truly before any competent * * * officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." Section 1, par. 9, subd. (c), of the State Primary Law (Stats. 1913, p. 1379, as amended by St. 1929, p. 121), provides that petitions to qualify a potential party on a ballot shall be circulated, signed, and verified substantially as provided by the Constitution and the Political Code for initiative petitions; and article 4, § 1, of the Constitution provides that petitions for initiative measures shall have attached thereto the affidavit of the person soliciting signatures to the same, stating, among other things, that all signatures attached were made in his presence, etc. The deputy registrar before whom appellant swore to the petitions was an officer authorized to administer oaths; and it is quite obvious, therefore, that the false statements made in appellant's affidavits were material, because necessarily the absence of said statement from the oaths would have brought about the rejection of the petitions by the officers with whom they were by law required to be received and filed.

[14] Appellant next urges that the prosecution should have been founded on section 64b (5) of the Penal Code, the provisions of which declare that "It shall be unlawful for any person to make any false affidavit concerning any petition mentioned in this section or the signatures appended thereto." As above shown, however, the facts of the present case brought it clearly within the provisions of the statute defining perjury; and therefore it is no defense that the prosecution might have proceeded under another statute. People v. Moulton, 116 Cal. App. 552, 2 P.(2d) 1009; People v. Collins, 195 Cal. 325, 233 P. 97.

[15] The final point made by appellant in her opening brief is that the court erred in refusing to give an instruction proposed by appellant to the effect that if the jury found that appellant believed in good faith that the petitions she filed were the ones she circulated, she should be acquitted. Conceding that the instruction might well have been given, its refusal was not prejudicial because the substance thereof was given in other instructions.

[16, 17] In her closing brief appellant seeks to raise an additional point not before presented; and not having been presented before, she is not entitled as a matter of right to have it considered at all. People v. Woods, 59 Cal. App. 740, 212 P. 41. However, we have examined the record in connection therewith and find nothing which might call for reversal. The point relates to certain questions propounded to appellant on cross-examination, but the answers given thereto were all favorable to her; and, consequently, even though it be deemed that the objections to the questions were improperly overruled, the rulings did not operate to appellant's prejudice. 8 Cal. Jur. 618.

The judgments and order appealed from are affirmed.

We concur: TYLER, P. J.; WARD, Justice pro tem.

9 Cal.App.2d 251

PEOPLE v. MOORE.

Cr. 2722.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1935.

Hearing Denied by Supreme Court Oct. 24, 1935.

1. Criminal law ⇨997

Statutory remedies have supplanted writ of error coram nobis as to so much of its former scope as is comprehended in such statutory remedies.

2. Criminal law ⇨997

Writ of error coram nobis may be granted only when defendant has been denied trial upon merits, and consequently statutory remedies are inapplicable.

3. Criminal law ⇨146

Statute of limitations which is appended to statutory remedy supplanting, in whole or in part, corresponding common-law remedy, prevails over statute of limitations which was appended to superseded common-law remedy.

4. Criminal law ⇨997

That defendant, who admitted prior convictions of felonies in other states, did not discover legal effect of such prior convictions in state, or that crimes of which he had been previously convicted were not considered as felonies in state, until too late for presentation in support of motion for new trial, did not permit resort to common-law writ of error coram nobis in absence of averments of duress, or that defendant's admission was obtained by outside influence, or that there was extrinsic fraud in connection therewith (Pen. Code, §§ 644, 668).

◆

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Alex Moore, who admitted prior convictions of felonies in other states, was convicted of receiving stolen goods. From an order denying his petition for the issuance of a writ of error coram nobis, the defendant appeals.

Order affirmed.

Orville R. Emerson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

Defendant by information was charged with a felony, to wit, receiving stolen goods, and with four prior convictions of felonies in other states. He admitted the prior convictions and was convicted on the primary charge and sentenced as an habitual criminal. From this judgment he appealed. People v. Moore, 137 Cal. App. 130, 30 P.(2d) 79. The judgment was affirmed, and immediately thereafter, he petitioned the superior court in which he had been tried and convicted, for the issuance of a writ of error, coram nobis. The point of the petition is that three of the prior convictions with which defendant was charged, which he had admitted and for which he had served terms of imprisonment in the penitentiaries of other states, were not felonies in this state. Pen. Code, §§ 644, 668; People v. Shaw, 137 Cal. App. 533, 30 P.(2d) 1031; People v. Pace, 2 Cal. App. (2d) 464, 38 P.(2d) 202; People v. Fitzwater (Cal. App.) 42 P.(2d) 1044; People v. Bigelow, 94 Cal. App. 28, 270 P. 460. Defendant avers in his petition that he was ignorant of the legal effect of these prior convictions under the law of this state, as set forth in the foregoing Code sections and cases, at the time he admitted them, and that if he had known that such convictions were not considered felonies in this state, he would not have admitted them.

It may be conceded for the purpose of this case that three of the four prior convictions admitted by defendant are not felonies in this state. Such concession, however, can be of no assistance to the defendant, since we are of the opinion that the mistake made by defendant cannot be cured by a petition for the writ of error, coram nobis, which "is in effect an attack upon the judgment, asking that it be set aside as void on the grounds and for the reasons already noticed, and that the defendant be allowed to enter a plea of not guilty" [People v. Superior Court (Cal. Sup.) 47 P.(2d) 724, 730], to said prior convictions.

[1] The frequent resort to a petition for this writ in recent years persuades one that those who have been convicted of crime have come to look upon it as a remedy which can work magic merely by reason of its invocation. There is, however, no shibboleth in a petition for a writ of error, coram nobis, even though the Latin name has survived to the present time. At common law it performed omnibus functions to call the attention of a trial court to its errors, and to give such court an opportunity to correct them. "At the time this writ came into general use there was no remedy by appeal or by motion for new trial. The ordinary writ of error afforded to a considerable extent the remedy now available by appeal and the writ of error coram nobis to a very limited extent the remedy now available upon motion for new trial." People v. Reid, 195 Cal. 249, 255, 232 P. 457, 460, 36 A. L. R. 1435. The original functions performed by this writ have under our procedure for the most part been included and are now separately classified in such remedies as the motion for new trial, motion to vacate a judgment, motion in arrest of judgment, and appeal from judgment. People v. Superior Court (Cal. Sup.) 47 P.(2d) 724; People v. Reid, 195 Cal. 249, 232 P. 457, 460, 36 A. L. R. 1435; People v. Mooney, 178 Cal. 525, 174 P. 325. "As these new remedies have come into existence by statutory enactment they have supplanted this ancient writ as to so much of its former scope as is comprehended in and covered by the statutory remedies." People v. Reid, supra, 195 Cal. 249, pages 255, 256, 232 P. 457, 460, 36 A. L. R. 1435.

[2-4] As said in People v. Mooney, supra, 178 Cal. 525, at page 529, 174 P. 325, 327: "It is in those cases where the defendant has been denied a trial upon the merits—in other words, where there has been no trial at all—that relief of this kind may be granted. In such cases it is obvious that the statutory remedies have no application and that defendant is wholly without remedy; and it is upon that theory that we look to the common law to provide a remedy. Such a case was People v. Perez, 9 Cal. App. 265, 98 P. 870; and, indeed, all of the cases cited, in which relief was afforded, were cases where no trial had been had, but a plea had been obtained from the defendant by some character of duress, or the trial was affected by some outside force." The averments of the instant petition make no suggestion of duress, or that defendant's admission of the prior convictions was obtained by any outside influence or that there was any extrinsic fraud in connection therewith. Whether defendant did move for a new trial, and, if he did, whether the point now presented was then urged, does not appear. Assuming that defendant made no such motion, and assuming further that defendant did not discover the facts upon which his petition is based until some time immediately preceding the actual filing thereof, we would still be powerless to grant any relief. This identical proposition was discussed and disposed of in People v. Reid, supra, 195 Cal. 249, pages 257, 258, 232 P. 457, 460, 36 A. L. R. 1435, where the court says: "Appellant concedes that the provision of a statutory remedy impliedly displaces the common-law remedy to the extent that the former is available, but argues that where the statutory remedy is unavailable by reason of the statute of limitations applicable thereto, that the common-law remedy should then be applied. He argues that because the defendant did not discover the facts here relied upon until too late to present them in support of his motion for new trial, the statutory remedy should be deemed 'unavailable,' and the common-law remedy should therefore be resorted to. He cites no authority which supports this conclusion and we are convinced that it is not sound. Where the Legislature has provided a statutory remedy which supplants in whole or in part a corresponding common-law remedy, and has appended thereto a statute of limitations different from that which governs the common-law remedy, there is presented the situation of a conflict between the common law and the statute, in which case the latter must prevail. To hold in such case that after the expiration of the statutory limit the common-law remedy could still be availed of would be to hold in effect that in case of conflict between the two the common law prevails over the statute. * * * We conclude, therefore, that the existence of a statutory remedy for the wrong here complained of by motion for a new trial, precludes a resort to the common law in this behalf."

We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his plea. Pen. Code, § 1018; People v. Bacciocco, 81 Cal. App. 19, 251 P. 817; People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A. L. R. 1441; People v. Cosgrove, 48 Cal. App. 710, 192 P. 165; People v. Moriarity, 61 Cal. App. 223, 214 P. 485; People v. Murphy, 62 Cal. App. 709, 217 P. 810; People v. Junod, 85 Cal. App. 194, 259 P. 101; People v. Blumen, 87 Cal. App. 236, 261 P. 1103. If, however, the defendant omits to do so, and the time has expired for the exercise of any of the statutory remedies after judgment, which might be invoked to cure the situation, and the judgment becomes final, there would be no further legal recourse by any form of judicial review. The same, we believe, is true in this case.

The order denying the petition is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

9 Cal.App.2d 223

Ex parte McKEON.

Cr. 1851.

District Court of Appeal, First District, Division 1, California.

Sept. 20, 1935.

1. Food 🔑**3**

Ordinance, passed after new city charter, requiring payment of inspection fee in handling and sale of foodstuffs for human consumption, *held* construable with ordinance passed before city charter, which made maintenance of premises for sale of foodstuffs subject to inspection as to sanitary conditions and to issuance of official certificate, and hence ordinance was not violative of section in city charter empowering regulation by ordinance and issuance of licenses only for operation of businesses affecting public health and providing that ordinance fix fee to be charged.

2. Municipal corporations 🔑**120**

Ordinances on same subject-matter must be construed together, although enacted at different times and contain no reference to one another, particularly when relating to revenue and taxation.

3. Food 🔑**3**

Ordinance providing for inspection fee in handling and sale of foodstuffs for human consumption *held* not violative of city charter provision prohibiting imposition of license tax on any seller operating at fixed place of business, except where police power is exerted to protect public health.

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Habeas corpus proceeding by Frank McKeon.

Writ discharged, and petitioner remanded.

Samuel T. Bush and Bertram H. Ross, both of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Arthur W. Jonas, Asst. Dist. Atty., both of San Francisco, for respondent.

TYLER, Presiding Justice.

Petitioner was charged with violating Ordinance No. 3.0412 of the city and county of San Francisco relating to the payment of an inspection fee in the handling and sale of foodstuffs for human consumption. It appeared at the trial that petitioner was engaged in the retail butcher business in San Francisco; that his premises had been inspected by the board of health, and though demand had been made upon him for payment of the inspection fee of $6, the amount provided for in the ordinance, he had refused to pay the same. The court found him guilty as charged and imposed a fine of $25 or an alternative of five days in the county jail. Petitioner appealed his conviction to the appellate division of the superior court, contending that the ordinance fixing the fee was illegal, unconstitutional, discriminatory, and in violation of the Federal and State Constitutions, and in direct conflict with the municipal charter. He also contended that the ordinance does not license nor provide for any specific type of inspection and that it is clearly and avowedly a revenue measure. The ordinance in question, among other things, provides in substance that for the purpose of defraying the cost of regulation and inspection of the premises of any person, firm or corporation engaged in the conduct or operation of the handling, manufacturing or sale of foodstuffs, with certain specified exceptions, a fee of $6 per annum shall be imposed.

The main contention of petitioner is that said ordinance is in direct conflict with section 24 of the charter of the city and county of San Francisco under the provisions of which the ordinance was adopted. This section empowers the supervisors to regulate by ordinance the issuance of licenses or permits for the operation of businesses which affect the health and certain other conditions of the city and county. It provides that such ordinances shall fix the fees to be charged, which shall not be less than the cost of regulation and inspection. It further provides that the ordinance shall specify the department to make the necessary examination and inspection before acting upon the application for a permit. It also contains an excepting clause to the effect that no license tax shall be imposed on any seller or manufacturer of goods, wares, or merchandise operating at a fixed place of business such as requires permits or licenses in accordance with or under authority of any local health, sanitary or other ordinance under the police power. In support of the claim that the ordinance is in direct conflict with the charter, it is urged that it does not provide for the issuance of any license, nor does it designate any department to receive formal application or to issue permits, and that it fails in an attempt to carry into effect the provisions of the charter as it cannot be ascertained therefrom whether the same places a charge for inspection with relation to health, fire prevention or other classifications contained in the charter, and that each of these classifications comes under the jurisdiction of a separate department of the municipal government. It is further urged that the ordinance does not license nor does it provide for any specific type of inspection, and it is clearly and avowedly a revenue measure.

In the complaint filed against petitioner it was alleged that he was engaged in the business of the handling and sale of foodstuffs for human consumption in the premises described which were subject to inspection by the board of health pursuant to Ordinance 2917 (new series), and that he willfully and unlawfully maintained such business in said premises without payment to the tax collector of the inspection fee provided by Ordinance No. 3.0412. Ordinance 2917 (new series), relating to inspection of premises, was adopted in 1914 as an ordinance regulating the manufacture, handling, care, and sale of foodstuffs. This ordinance remained in force after the adoption of the new charter. The theory upon which the case was tried was that the two ordinances were to be read together as laws in pari materia; that Ordinance 2917 (new series) is to be invoked as primary authority for requiring inspection by the board of health and making the maintenance of the premises for the sale of foodstuffs dependent upon the issuance of the official certificate, while the inspection fee therefor and the provisions for enforcement of payment are established by the inspection fee Ordinance 3.0412.

[1, 2] The appellate division of the superior court concluded that the trial court properly held the two ordinances, relating as they do to the same general subject-matter and forming parts of one scheme of legislation, though adopted at different times, constituted a well-rounded sanitary regulation, each constituent supplementing the other. We are of the opinion that the ordinances being in pari materia were properly construed. Ordinances on the same subject-matter must be construed together, although they are enacted at different times and contain no reference to one another (McGrath v. Kaelin, 66 Cal. App. 41, 225 P. 34; 59 Cor. Jur. 1042), and this is particularly so in the construction of statutes relating to revenue and taxation (Old Homestead Bakery, Inc., v. Marsh, 75 Cal. App. 247, 242 P. 749). Thus construed, they are not violative of section 24 of the charter. As the court below held, the charter provision empowers the supervisors to regulate by ordinance the issuance of licenses or permits for the operation of businesses which affect the health and certain other conditions of the city. It also provides that the ordinance shall fix the fee to be charged, which shall not be less than the cost to the city of regulation and inspection. Ordinance 2917 (new series) provides that upon application the board of health shall inspect the business premises to ascertain whether they are sanitary and to issue a certificate, and Ordinance No. 3.0412 provides for the amount of the fee.

[3] Petitioner compares section 24 of the new charter with the corresponding section of the old charter and argues that there is no substantial variance in the clauses therein relative to the restraint against imposition of a license tax upon a "seller or manufacturer of goods, wares or merchandise operating at a fixed place of business in the city and county," and petitioner directs our attention to the cases of In re Hadeler, 61 Cal. App. 630, 215 P. 562, and John Rapp & Son v. Kiel, 159 Cal. 702, 115 P. 651, 653, which he claims make it clear that no license charge or tax of any kind should be imposed on any person selling or manufacturing goods, wares or merchandise at a fixed place of business. It is true that in the Hadeler Case it was held the board of supervisors had no power to impose upon keepers of grocery stores a license tax, charge, or fee for the purpose of defraying the cost of making an inspection of the premises to determine whether they were sanitary, and an ordinance providing for the imposition of such a fee and its collection by the board of health as a condition to the issuance of a certificate was an unauthorized enactment. In the Rapp Case it was held that under the provisions of the charter prohibiting the board of supervisors from imposing a license tax "upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares, or merchandise, except such as require permits from the board of police commissioners," the supervisors had no authority to impose any license charge, fee, or tax of any kind either for the purpose of regulation or revenue upon any person who, at a fixed place of business, sold certain character of liquors in certain quantities. Both of these cases were decided under provisions of the old charter. As pointed out in the Hadeler Case, the conduct of the grocery business did not require the consent of the police commission and hence no license fee legally could be imposed. Likewise, in the Rapp Case no permit from the police commissioners was required for sales of liquor in quantities exceeding a quart and not to be drunk upon the premises. In section 24 of the new charter the wording is: "No license tax shall be imposed on any seller * * * operating at a fixed place of business * * * except such as require permits or licenses in accordance with or under authority of any local health, sanitary or other ordinance under the police power." Under the old charter the qualifying clause read: "* * * except such as require permits from the Board of Police Commissioners as provided in the Charter." Subdivision 15, § 1, chap. 2, art. 2. It thus appears that under the old charter no license tax for regulation or revenue could have been imposed on the conduct of a business subject to inspection under Ordinance 2917 (new series), but under the new charter a regulatory or inspection fee is expressly allowable in the administration of a health or sanitary ordinance. Neither of the cited cases is controlling.

The writ is discharged, and petitioner is remanded.

We concur: KNIGHT, J.; CASHIN, J.

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9 Cal.App.2d 310

AUFORT v. AUFORT.

Civ. 9961.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1935.

1. Marriage 🔑58(7)

Concealment on part of wife that she is in unmarriageable condition is fraudulent concealment material to marriage contract and affords good ground for annulment of marriage.

2. Marriage 🔑58(2)

To be "marriageable," woman must be able to bear children.

[Ed. Note.—For other definitions of "Marriageable Woman," see Words & Phrases.]

3. Marriage 🔑58(2)

Failure of woman to disclose to prospective husband that she had been sterilized *held* fraudulent concealment sufficient to warrant annulment of marriage.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by Edward Aufort against Mabel Frances Aufort. Judgment for defendant, and plaintiff appeals.

Reversed.

Leo A. Sullivan and John G. Robertson, both of Oakland, for appellant.

Samuel L. Gold, of Oakland, for respondent.

TYLER, Presiding Justice.

Suit for annulment of marriage. Plaintiff alleges in his complaint that he and defendant, his wife, were married on March 10, 1930, and that prior to that time defendant had been committed to the Sonoma State Hospital as a feeble-minded person. He further alleges that defendant fraudulently concealed this fact from him and also the further fact that she was sterilized in the Sonoma State Home on March 16, 1919; that he first learned of these facts on or about the 1st day of July, 1932, and never since has cohabited with the defendant. The prayer of the complaint seeks a decree of annulment of the marriage. Defendant failed to answer the complaint, and her default was taken and entered. A judgment for decree of annulment was denied by the court. This is an appeal from such judgment.

[1-3] The sole question here involved is whether the fraud alleged entitles plaintiff to the relief which he seeks. Fraud is a generic term embracing many varying forms of deception, and it may be actively pronounced or brought about by disingenuous silence. While courts should be slow to disregard the rights following marriage, as to annul the same is a harsh remedy, still in an extreme case such as is here presented the remedy should not be withheld. Any concealment on the part of the wife that she is in an unmarriageable condition is a fraudulent concealment material to the contract and affords good ground for setting it aside and declaring the marriage void. There is no sound rule of law or consideration of policy which re-

quires that a marriage procured by such fraud should be held valid and binding. In Baker v. Baker, 13 Cal. 87, which was a suit for annulment on the ground of fraud, in that there was a concealment of pregnancy from a husband who had not sustained improper relations with his wife prior to marriage, Justice Field, speaking for the court, stated: "Again, the first purpose of matrimony, by the laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract." To the same effect is Barnes v. Barnes, 110 Cal. 418, 42 P. 904. So, also, in Turney v. Avery, 92 N. J. Eq. 473, 113 A. 710, which was a suit for annulment of a marriage on the ground of fraud in failing to disclose, as here, that defendant was sterile by reason of an operation and could not bear children, plaintiff was held to be entitled to an annulment. It was there said that the procreation of children is the most important end of matrimony, and, when a woman, knowing herself to be barren and incapable of conceiving and bearing children by reason of an operation, does not disclose this fact to her intended husband, he, upon discovering such sterility after marriage, is entitled to a decree of annulment on the ground of fraud. This being so, it is unnecessary to discuss the question of antenuptial insanity.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

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9 Cal.App.2d 292

MORALES v. L. W. BLINN LUMBER CO. et al.

Civ. 10215.

District Court of Appeal, Second District, Division 1, California.

Sept. 27, 1935.

1. Appeal and error 🔑1011(1)

Where trial court, sitting without jury, found that truck driver was not negligent in shoving railroad car along track with truck, that finding to contrary would also be supported by conflicting evidence furnished no ground for reversal of judgment.

2. Negligence 🔑25

Notice or warning is unnecessary where danger is obvious or person injured has actual notice thereof.

3. Automobiles 🔑244(2)

In action for injuries to workman who was pinned between railroad car and truck when another truck shoved car along track, evidence sustained implied finding of trial court sitting without jury that notice of moving of car was given to workman and coemployees.

4. Automobiles 🔑155

In action for injuries to workman who was pinned between railroad car and truck when another truck shoved car along track, truck driver and his employer were not liable even if truck driver was trespasser or a volunteer, unless he was negligent in operation of truck.

5. Appeal and error 🔑1008(1)

Findings of trial court sitting without jury as to negligence of truck driver whose truck shoved railroad car along track, injuring workman, *held* controlling upon reviewing court.

◆

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Demetrio Morales against the L. W. Blinn Lumber Company and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frankley & Spray and W. H. Abrams, all of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

This action, brought by appellant to recover damages for personal injuries, has previously been before this court, and a judgment for the defendants entered upon a directed verdict was reversed. 139 Cal. App. 53, 33 P.(2d) 16. The present appeal is from a judgment in favor of the respondent lumber company and Hughes, its employee, after a second trial.

[1] Appellant urges a number of points as grounds for reversal of the judgment, but they are all based upon the assumption that the evidence justifies only one finding concerning the facts of the case. The record, however, shows the evidence to be conflicting, and the finding of the trial court that the respondent Hughes was not

negligent in his operation of the lumber company's truck is amply supported. That a finding to the contrary would also be supported furnishes no ground for a reversal of the judgment.

The accident occurred on the property of Layne & Bowler Company, a part of which had been leased to one Kranzler for the purpose of conducting a junk business. The Blinn Company's truck driven by Hughes entered the property with a load of lumber for the Layne & Bowler Company. It could not proceed to the point where the lumber was to be delivered because there was a railroad car in the way. This car had been spotted for the use of Kranzler, who was loading junk into it.

One Thompson, a shipping clerk for Layne & Bowler, went out to receive the load of lumber, and told Hughes that he would have the car moved. He then went to Kranzler and told him to move the car. This Kranzler attempted to do with a dump truck, to which the car was attached by a chain. Assisting him were his two sons and Morales, appellant here.

According to the testimony of Thompson, after several unsuccessful attempts had been made by Kranzler and his men to move the car, he said to them: "We have got to get the car moved, and, so, we will have the Blinn man give us a hand." Thompson then went back to the lumber truck, where Hughes had remained in the driver's seat, and asked Hughes to give the railroad car a push. A 4x4 block was placed between the truck and the car to provide means for applying the force. On a signal from Thompson, Hughes drove the truck against the block. The car started, but the block came out. At this time one of the Kranzler sons came back from the dump truck where he had been working and held the block against the car for a second push. The car continued to "inch" along very slowly and moved a total distance of less than twelve feet. However, appellant was caught between the railroad car and the dump truck and was injured.

[2] Appellant contends that Hughes owed him the duty to use ordinary care to keep from injuring him, and that this duty was not performed, because Hughes admitted that he gave no signal or warning before starting his truck. Appellant was entitled to notice that the car was to be pushed, but, if that notice was actually given to him by Thompson, he cannot complain because it was not imparted by Hughes. "Notice or warning is not necessary where the danger is obvious, or the person injured has actual notice thereof." 45 Cor. Jur. 876, § 306. This rule is based upon sound reason. For instance, where an injured person knows of the approach of a car, the failure of the railroad company operating it to sound an alarm has no causal connection with the accident. Starck v. P. E. R. Co., 172 Cal. 277, 282, 156 P. 51, L. R. A. 1916E, 58.

[3] The record before us contains ample evidence to support the implied finding of the trial court that notice of the moving of the car was given to appellant and those working with him. In addition to the testimony of Thompson, one of the Kranzler sons testified that Thompson told him, his father, his brother, and Morales, that the Blinn Lumber truck was going to push the car. And, from the evidence in the case, a finding that this notice or warning had been given is not necessarily inconsistent with the court's finding that appellant was not negligent.

Appellant seeks to bring himself within the rule that railroad companies are liable for damages caused when they move cars without notice. What has been said concerning the evidence of notice or warning disposes of this point.

[4] The further contention is made that Hughes and the lumber company were both trespassers and volunteers, and are liable for any injury committed by them. Assuming that Hughes was either a trespasser or a volunteer, respondents are not liable to the appellant, unless Hughes was negligent in the operation of his truck, and, as has been pointed out, the evidence in this case supports the finding of the trial court that he was not negligent.

[5] The whole question of Hughes' negligence was one for the determination of the trial court from the evidence in the case, and its findings are controlling here. The rule is thoroughly settled and has been stated as follows: " 'It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the

circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury.' Hoff v. Los Angeles Pacific Co., supra [158 Cal. 596, 112 P. 53], quoting from Seller v. Market St. R. Co., 139 Cal. 268, 72 P. 1006." Gregg v. Western Pac. R. Co., 193 Cal. 212, 225, 223 P. 553, 558.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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9 Cal.App.2d 256

PEOPLE v. NELSON.

Cr. 2755.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1935.

Criminal law 🔑1130(2)

Where defendant set out in brief refused instructions, but did not state wherein court erred in refusing instructions, and did not set out instructions given or show wherein refused instructions were not covered by instructions which were given, appellate court refused to consider alleged error in refusing such instructions.

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Leonard Nelson was convicted of second degree murder, and he appeals.

Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

YORK, Justice.

Appellant was charged by information with the crime of murder, trial was had before a jury, and a verdict of second degree murder was returned. This is an appeal from the judgment of conviction and from the order denying appellant's motion for a new trial.

Appellant's own statement of the testimony introduced at the trial conclusively shows that there was sufficient evidence to justify the jury in bringing in the verdict.

Appellant in his brief refers only to error made by the trial court in refusing to give four instructions which were requested by him, without pointing out any reasons why it was error to refuse to give any of these four instructions and without setting out the instructions which were actually given. Appellant sets out in his brief each of the refused instructions, but he makes no reference anywhere therein as to why these instructions should have been given, and there is nothing to show that the subject-matter covered by these instructions, so far as proper, was not fully covered by instructions that were given. People v. Stein, 23 Cal. App. 108, at page 117, 137 P. 271. Appellant's only argument in this respect is that: "Because of the facts adduced, as reflected by the record, and because of the alleged errors of the trial court, appellant prays that this court may reverse the judgment of the court below, and grant to this appellant a new trial, to the end that justice may still reign."

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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9 Cal.App.2d 284

GOULD v. KEITH et al.

Civ. 10418.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1935.

1. Alteration of Instruments 🔑20

Indorser of mortgage note is released from liability by any unauthorized alteration of obligation assumed.

2. Bills and notes 🔑301

Payee's agreement with maker, not supported by consideration, to reduce interest and extend time for payment of note, *held* unenforceable, and hence did not release indorser from liability.

3. Bills and notes ⚷301

That payee of note accepted $35 instead of $40 on past-due interest from maker *held* not to change terms of contract with regard to indorser, but amounted merely to executed oral gift of $5 to payee and did not release indorser from liability on note.

◆

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Claude J. Gould against Karl H. Keith, R. B. Coleman, H. F. Brainard, and others. From an adverse judgment, defendant Coleman appeals.

Affirmed.

Bordwell, Mathews & Wadsworth, of Los Angeles, for appellant.

Syril S. Tipton and Elmer E. Sawyer, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

[1-3] Legal principles logically elucidated by the late Chief Justice Shaw in Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am. St. Rep. 111, and in Braun v. Crew, 183 Cal. 728, 192 P. 531, determine adversely to appellant the points involved in this appeal. It is true that appellant as indorser of the mortgage note would be released from liability by any unauthorized alteration of the obligation assumed; but when respondent as payee of the note entered into an agreement with the maker to reduce the rate of interest and to extend time of payment, this agreement, as per the finding of the trial court, was not supported by a consideration and was therefore unenforceable and respondent was not thereby bound to forbear suit during the time specified in the extension. If it did not modify the original note, it had no effect upon the liability of the indorser. Furthermore, the acceptance by the payee of the note of $35 instead of $40 on past-due interest did not change the terms of the contract with regard to the guarantor, but amounted merely to an executed oral gift to the payee of the $5. The judgment, therefore, was properly entered against such indorser.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

4 Cal.2d 440

LYNCH v. KEMP.

L. A. 15043.

Supreme Court of California.

Oct. 3, 1935.

1. Guardian and ward 🔑136

Guardian for decedent's minor niece who instituted will contest in behalf of niece was not personally liable on judgment for costs recovered by sole legatee, notwithstanding that guardian, while not named as contestant, was named in contest as heir of decedent, and guardian's property was not subject to execution to satisfy judgment, so that sole legatee did not obtain good title to such property when he purchased it at execution sale.

2. Judgment 🔑592

Failure, in action to quiet title to parcel of realty improperly executed upon and sold, to quiet title to another parcel of realty which was also improperly executed upon and sold to satisfy same judgment, was not forfeiture of right to quiet title to the other parcel or of right to damages for slander of title, since statute permitting joinder of such causes of action was not mandatory (Code Civ. Proc. § 427).

In Bank.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action to quiet title by H. L. Lynch against Helen Kemp, in which the defendant filed a cross-complaint. From a judgment for the defendant on the cross-complaint, the plaintiff appeals.

Affirmed.

H. L. Lynch and Will H. Light, of Los Angeles, for appellant.

Davis & Thorne and Ernest W. Pitney, all of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an appeal by plaintiff from a judgment on defendant's cross-complaint, quieting defendant's title to certain real property and awarding damages to defendant for slander of title.

Plaintiff, as the sole legatee of Mary Rheinschild, deceased, offered the will of said decedent for probate. The petition for probate named defendant and certain others as the next of kin of the decedent. Thereafter the defendant, as guardian ad litem of her niece, filed a contest on behalf of her ward. The contest named defendant and others as heirs of decedent. In due time the contest was voluntarily dismissed and judgment for costs awarded to the plaintiff here by the probate court. Upon nonpayment of the costs, plaintiff levied upon two parcels of real property owned by the defendant and situate in different cities. Plaintiff thereafter bid in said parcels at the execution sale and received the sheriff's certificate therefor. Defendant subsequently brought an action against plaintiff to quiet title to one of these parcels. Defendant's title was quieted to said parcel on the theory that defendant had not been the contestant, but only the guardian ad litem of the contestant, in the probate proceeding, and that defendant was not therefore personally bound by the judgment for costs therein awarded and her property not subject to execution upon such judgment. This court affirmed the judgment quieting defendant's title to said parcel of real property. Kemp v. Lynch, 220 Cal. 505, 31 P. (2d) 375. While that action was pending, the plaintiff (defendant in the other action) brought the present action to quiet his title to the other parcel covered by the sheriff's certificate issued to him. Defendant, as the original owner thereof, answered and cross-complained, praying for damages for alleged slander of her title to both parcels. At the commencement of the trial it appeared from plaintiff's own testimony that before the execution of the sheriff's deed thereto he had assigned the sheriff's certificate covering the parcel not involved in the prior action. It was thus immediately apparent that plaintiff as to said parcel was not in a position to procure the relief sought in his complaint, which complaint was stricken from the files, and the cause proceeded to trial upon the defendant's cross-complaint for damages for slander of title. At the conclusion of the trial, judgment was entered quieting defendant's title to the second parcel and awarding her compensatory damages in the sum of $500 and exemplary damages in the sum of $250. The trial court determined, in substance, and in conformity with the prior decision involving one of the parcels, that, defendant not being personally liable on the costs' judgment entered in the contest, her property was not subject to execution thereon. From the judgment awarding damages for slander of title and quieting defendant's title to this second parcel, plaintiff prosecutes this appeal.

A motion made by defendant to dismiss or affirm for lack of merit in the appeal has been submitted with the cause on the merits. The motion must be granted. While appellant in his opening brief purports to state fifteen propositions or points, the appeal presents but two major contentions, neither of which has merit.

[1] Appellant urges that, while defendant was not expressly named in the contest as one of the contestants, she was named therein as one of the heirs of the decedent, and was therefore a party in interest who would have benefited equally with the contestant had the contest been successful. This being so, it is contended that she should be held to be equally liable with the contestant on the judgment for costs. With this as a premise, appellant concludes that it was proper to execute on defendant's property in satisfaction of such judgment and that he therefore obtained good title to such property at the execution sale. The point obviously lacks merit. If appellant's reasoning be adopted, it would necessarily follow that, whenever one of several heirs contested a will, the other heirs, though not contestants and though willing to abide by the terms of the will, would nevertheless be answerable for costs should the contest be unsuccessful. Moreover, the prior decision of this court, supra, though involving a different parcel of property, had the effect of determining this point adversely to appellant, because there, as here, defendant's title was quieted on the theory that her property should never have been subjected to execution for the costs of the contest.

[2] Appellant's second principal point is that defendant has improperly split an alleged single cause of action. In other words, it is contended that defendant, by seeking in the prior action to quiet her title to only one of the parcels improperly executed upon and sold, forfeited her right to quiet title to the other parcel improperly executed upon and sold and her right to damages. With this contention we cannot agree. Blodgett v. Trumbull, 83 Cal. App. 566, 257 P. 199. These causes of action could well have been joined under the provisions of section 427 of the Code of Civil Procedure, but such a course was not mandatory.

Other points urged by appellant as to the insufficiency of the evidence to support certain findings are without merit. His contentions that the court erred in striking out his complaint, in refusing to permit an amendment thereof, in ruling on the inadmissibility of certain evidence, and in refusing a continuance, are also devoid of merit.

The motion is granted and the judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.

4 Cal.2d 379

TWOHEY v. REALTY SYNDICATE CO. et al.

S. F. 15124.

Supreme Court of California.
Sept. 27, 1935.

Rehearing Denied Oct. 24, 1935.

1. Principal and agent ⚷137(1)

Principal who confers upon his agent power to negotiate sale of his property in his name and to collect purchase price therefor in installments is estopped to deny authority in such agent to receive from purchaser for his account listed securities which are equivalent of cash to be applied upon such purchase price (Civ. Code, §§ 2317, 2338).

2. Principal and agent ⚷105(4)

Where purchaser of realty delivered to vendor's agent, under agreement with agent, stock certificates to be sold and proceeds applied to purchase price of realty, vendor *held* liable for such proceeds appropriated by agent (Civ. Code, §§ 2317, 2338).

3. Account stated ⚷7

Purchaser of realty *held* not released from liability for proceeds of stock, which were to be applied on purchase price of realty, on ground that transfer by mutual consent of payments made on three contracts to fourth contract for purchase of such realty and payment of additional sum constituted account stated, since such negotiations did not alter purchaser's obligation under written contract (Civ. Code § 1698).

4. Account stated ⚷1

"Account stated" is mere unperformed promise by one party to pay stated sum to another and is therefore executory contract (Civ. Code, § 1661).

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Nadine M. Twohey against the Realty Syndicate Company and others. Judgment for defendants, and plaintiff appeals; the appeal affecting only the named defendant, as the others had secured a dismissal of the action as to them.

Reversed and remanded, with directions.

Rehearing denied; THOMPSON and CONREY, JJ., dissent.

Aitken & Aitken, and Thomas D. Aitken, all of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent Realty Syndicate Co.

Theodore Tamba and Horace W. B. Smith, both of San Francisco, for respondent United Fidelity & Guaranty Co.

Joseph G. De Forest, of San Francisco, for respondent American Surety Co.

PRESTON, Justice.

This is a judgment roll appeal by plaintiff from a judgment for defendants. The appeal affects only defendant the Realty Syndicate Company, defendant surety companies having secured a dismissal of the action as to them.

Respondent and appellant occupy, respectively, the position of seller and purchaser of real property. Appellant, either by direct negotiations or by assignment, became the purchaser under four instalment contracts of sale executed by respondent and for convenience here designated contracts 1, 2, 3, and 4. On May 28, 1930, by mutual consent, payments made on contracts 1, 3, and 4 were transferred and credited upon contract No. 2, so there was subsisting at the time of trial of this action only contract No. 2. This contract was for an instalment purchase of a series of lots for the contract price of $8,250. After the adjustment above referred to and payment of $600 additional by appellant, there still remained unpaid on said contract the sum of $4,247.52, if the books of respondent are to be considered as final in the matter. But appellant denies that said book accounts are correct and by this action she seeks to compel credit on said contract No. 2 of a sum in excess of said balance claimed by respondent to be due thereon and judgment for such excess. Her contention grows out of the following undisputed facts:

In the negotiations which resulted in these contracts appellant dealt exclusively with the agent of respondent, one James R. Farrell, and with the exception of a single $10 item each payment made by her on each of the contracts was made exclusively to and through said agent. Respondent ratified all acts of its agent in negotiating the contracts and all sums reported by him to it were accepted as payments and noted upon its books. It further appears that to meet her obligations under said contracts appellant indorsed in blank and handed to said agent for delivery to respondent on account thereof, certificates and shares of listed stock as follows: October 21, 1929, 7 shares; October 30, 1929, 18 shares; December 26, 1929, 1 share; January 15, 1930, 2 shares; December 28, 1929, 2 shares. The market value of said certificates, calculated as of the respective dates of delivery to said agent aggregated the sum of $7,223.50. Had said sum been applied to said contracts, appellant would not have been in arrears on any of her purchases. The truth of the matter seems to be that the agent Farrell converted these stocks into cash and reported only the sum of $2,504.83 thereof to respondent, appropriating unto himself the remainder. Appellant seeks to hold respondent liable for the full amount of the proceeds of sale of said stock. Respondent counters with the contention that Farrell was not authorized to collect the instalments due in any form except money and by delivering the stock to Farrell she thereby constituted him her agent for disposition thereof, thus deducing the conclusion that respondent is not liable to appellant therefor.

The court, however, found as follows: "That plaintiff delivered to said Farrell certificates for thirty shares of * * * stock * * * issued in her name * * indorsed by her in blank" on the dates above set forth; "that said certificates were delivered for the purpose of having the shares of stock represented thereby sold by defendant * * * at the highest market price obtainable at the respective times said certificates were delivered and having the proceeds thereof applied as payments on said contracts and were so delivered on an agreement made by plaintiff with said Farrell that said shares would be sold and the proceeds so applied. * * *"

[1, 2] Under this finding respondent became responsible to appellant for the proceeds of said stock upon any one of three or four separate and well-understood principles. We need mention but two. The transaction falls clearly within the principle embodied in section 2338 of the Civil Code, which reads: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529; Clark v. Tavares, 220 Cal. 267, 29 P.(2d) 859; Johnson v. Monson, 183 Cal. 149, 151, 190 P. 635.

Again, we do not hesitate to declare as a matter of law that a principal who confers upon his agent the power to negotiate a sale of his property in his name and to collect the purchase price therefor in installments, is thereby estopped to deny authority in such agent to receive from the purchaser for his account listed securities which are the equivalent of cash to be applied upon such purchase price. This is a clear case of ostensible authority. Civ. Code, § 2317.

[3] As a further defense to the action respondent pleaded that by virtue of the release of the three other contracts above mentioned and application of the sums paid thereon as credits on contract No. 2, and by reason of the payment of the additional sum of $600 upon contract No. 2, there arose between the parties an account stated which effectively excluded the consideration of the proceeds of sale of said certificates of stock. It is true that the answer properly pleads an account stated, but it is equally true that the court specifically and intentionally refused to make a finding covering the elements of such a defense. On the contrary, finding No. 13, which covers this matter, is to the effect that the court only found that respondent rendered to appellant a full and complete accounting of its own book entries. From the findings as a whole it is clear that the court found that there was no other subject-matter under consideration than the entries that appeared on the books of respondent, which showed only credits or offsets as entered therein and not as they may have existed in fact.

The adjustment that took place on May 28, 1930, as chronicled in the findings, is wholly independent of and without reference to the claims of appellant here asserted. It is not shown that the transaction was anything more than a voluntary waiver and adjustment of the several contracts existing and a condensation of them into one purchase. Appellant is obligated by her written contract. No other special written contract is shown to have supplanted it. Whatever may be the proper characterization of these adjustment negotiations, it is clear that the contract of purchase was in writing; that the negotiations left this contract still subsisting and therefore executory, and because of such fact, to alter it a promise in writing would have been required to satisfy the statute. Section 1698, Civ. Code.

[4] A quotation from Bennett v. Potter, 180 Cal. 736, 744, 183 P. 156, 159, seems directly applicable: "An account stated is a mere unperformed promise by one party to pay a stated sum to another, and it is therefore an executory contract. Civ. Code, § 1661; Pearsall v. Henry, 153 Cal. [314], 325, 95 P. 154, 159. To allow a written contract to be thus altered by an oral statement of account, or by any statement not agreed to in writing by the debtor, would violate the rule of the Code that 'a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' Civ. Code, § 1698."

It appearing from the foregoing that respondent was fully liable to appellant for the unaccounted for proceeds of said stock, it is ordered that this judgment be, and same is hereby, reversed, with directions to the court below to take such further steps in the cause as may be found meet and proper and not inconsistent with this holding.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

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4 Cal.2d 371

ISLAIS COMPANY, Limited, v. MATHESON, Treasurer.

S. F. 15222.

Supreme Court of California.

Sept. 26, 1935.

Drains 🔑86

Under statute authorizing collection of penalties and interest on delinquent reclamation assessments, accrued interest should be computed to date of sale and added to delinquent installment and 20 per cent. should be computed on both (Pol. Code, § 3480, as amended by St. 1927, p. 1449, § 2).

In Bank.

Mandamus by the Islais Company, Limited, against Duncan Matheson, as treasurer of the City and County of San Francisco.

Peremptory writ denied.

Prior opinion, 45 P.(2d) 330.

Leo J. McEnerney, of San Francisco (McEnerney, Morris, Gillen & McEnerney, of San Francisco, of counsel), for petitioner.

John J. O'Toole, City Atty., Henry Heidelberg, Asst. City Atty., and Allen G. Wright, all of San Francisco (Wright & Wright & Larson, of San Francisco, of counsel), for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ for respondent.

SHENK, Justice.

By this proceeding in mandamus the petitioner seeks to compel the respondent to accept a sum of money in full payment of a call for an installment of an assessment levied by the Islais Creek Reclamation District for reclamation purposes.

On June 20, 1928, an assessment in the sum of $1,620,150 for reclamation purposes was levied upon all the lands in the Islais Creek Reclamation District, $14,433.57 of which was levied against tract No. 282, owned by the petitioner. A bond issue was duly voted for by the electors on September 4, 1928, in the principal sum stated, and sold. On September 18, 1933, the respondent duly made a call of an installment of said assessment to be paid by the assessed landowners in the district to meet bond payments of principal and interest to become due on January 1, 1934. The amount of the installment of the assessment and accrued interest called against said tract No. 282 was the sum of $1,367.38. The petitioner did not respond to the call and the installment became delinquent on October 31, 1933. The notice of sale for delinquency contained the following item: "Tract No. 282, The Islais Co., Ltd., Installment—$1,367.38; Interest—$9.84; Penalty—$275.44; Total—$1,652.66." The tract was sold to the district as the highest bidder therefor pursuant to sale conducted on December 7, 1933, for nonpayment of the installment, interest, and penalty. The petitioner tendered to the respondent the amount of the call and interest, with the 20 per cent. penalty computed on the amount due at the date of delinquency, which he also tendered, which was less by approximately two dollars than the amount demanded by the respondent.

The applicability of the amendment in 1927 of section 3480 of the Political Code (St. 1927, p. 1449, § 2), in prescribing the duties of the respondent in the collection of penalties and interest on account of delinquent assessment calls, is determined in Islais Co., Ltd., v. Matheson (Cal. Sup.) 45 P.(2d) 326. It was there held that the 1927 amendments governed the proceeding and that the amendments of 1931 (St. 1931, p. 762, § 6) and 1933 (St. 1933, p. 1219, § 4) were inapplicable.

The petitioner contends that the sale to the district is void by reason of the fact that the respondent has not complied with the law in computing the amount of the penalty, and that the sale was for an excessive amount.

By the demurrer to the petition the facts are admitted to be: That the respondent has calculated the penalty of 20 per cent. on the amount of the installment called, plus the sum of $9.84, which it is alleged is the amount of interest at 7 per cent. to the date of sale, or rather to the last day of the 60-day period within which the sale could lawfully be conducted. The petitioner contends that the penalty should have been computed only on the amount of the call on the date of delinquency, which it is assumed includes the interest accrued to that date. The question for determination is as to the correctness of the respondent's computations pursuant to the applicable statutory law.

The law under which the assessments were levied and the bonds issued provided that when such bonds have been authorized to be issued on the assessments "all unpaid assessments shall bear interest at the rate of seven per cent per annum from the date of the bonds originally issued thereon until such bonds" have been fully paid and discharged, and "the interest due at any time on said unpaid assessments may be called without calling any instalment of said assessment. The word instalment as used in this section shall be construed as applying to interest as well as the principal as the case may be." The statute then provides that at least 90 days before any interest date of the bonds the county treasurer shall estimate the amount of money necessary to pay the interest and principal maturing on such interest date and shall publish a notice substantially in the following form: "Notice is hereby given that an instalment of assessment (describing it) of (amount or proportion thereof including interest thereon or only for interest) is payable within thirty days from (date) by all assessed landowners of said district in the county of (name of county) to the treasurer of said county. All or any part of said instalment or interest which shall remain unpaid on the (day fixed) will be delinquent, together with accrued interest thereon, with twenty per cent of such instalment and interest added as penalty." The section then provides that "if any part of such instalment or any interest thereon shall remain unpaid at the expiration of thirty days from the date of said notice, it shall become delinquent and twenty per cent of the unpaid amount of said instalment and interest shall be added thereto and collected by said treasurer." The statutory notice of sale was also made to provide that upon delinquency in payment the property would be sold "for the amount of the instalment delinquent on such parcel, the amount of interest thereon reckoned to the day of sale, the amount of such twenty per cent penalty thereon. * * *"

The petitioner contends that the statute contemplates that the 20 per cent. penalty must be computed as of the date of delinquency, that is, on the amount of the principal plus accrued interest called as of that date; and that the fact that interest to the date of sale may also be payable does not indicate that such interest is to be added to the amount of the installment before the 20 per cent. penalty is computed.

We think the language of the section is not open to the construction placed thereon by the petitioner. As noted, the statutory notice provides that the installment, together with accrued interest thereon, with 20 per cent. of such installment and interest added as penalty, will be delinquent. From what has been said, it is obvious that the installment is the amount of the call, whether it be interest only, or principal and interest. The words "together with accrued interest thereon" presupposes something not included in the installment. There is no express provision limiting such additional interest to the interest accrued at the date of delinquency. The further language of the section that in the event of delinquency "twenty per cent of the unpaid amount of said instalment and interest shall be added thereto and collected by the treasurer," is consistent with the construction that interest to the date of sale was intended. Furthermore, the statutory notice indicates without question that the amount of interest is to be reckoned to the date of sale, and the 20 per cent. penalty computed thereon.

We conclude that the foregoing pertinent provisions of the statute contemplate that whenever accrued interest was payable it should be computed to the date of sale and added to the delinquent installment and the 20 per cent. penalty computed on both. The respondent conceived this to be his duty under the statute, and the regularity of the proceedings carried forward on that theory is not questioned.

The peremptory writ is denied.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.

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4 Cal.2d 375

SIBLEY GRADING & TEAMING CO., Limited, v. CRARY et al.

S. F. 15320.

Supreme Court of California.

Sept. 27, 1935.

1. Improvements 🔑4(4)

Complaint which alleged furnishing of labor, machinery, and equipment for improvement of land owned by defendant, at request of certain defendants as co-owners and agents of all, reasonable value of services, amount unpaid, proper filing of lien, and execution of notes by certain defendants as evidence of indebtedness, *held* not demurrable.

2. Liens 🔑22

Where action purports to be one for foreclosure of lien, if allegations are insufficient to show plaintiff entitled to lien but states good cause of action for labor furnished and rental of equipment, pleading is not subject to general demurrer.

3. Liens 🔑22

Question of whether complaint showed that plaintiff timely filed claim of lien upon realty could not be raised under general demurrer (Code Civ. Proc. § 1187).

4. Liens 🔑16

Acceptance of note as evidence of indebtedness and not by way of payment does not constitute waiver of right to lien nor affect right to personal judgment for debt evidenced by note.

5. Limitation of actions 🔑180(1)

Bar of limitations *held* not available to defendant on general demurrer to plaintiff's complaint.

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In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Sibley Grading & Teaming Company, Limited, against Edith S. Crary, as administratrix with the will annexed of the estate of C. S. Crary, deceased, and others. From a judgment for the defendants, the plaintiff appeals.

Judgment reversed, with directions.

Henry F. Wrigley and Randolph V. Whiting, both of San Francisco, for appellant.

Gilbert D. Ferrell and Fred W. Comba, both of Redwood City, for respondents.

CURTIS, Justice.

This is an appeal from a judgment in favor of defendants Frank Chapman, Katherine Chapman, his wife, and R. P. Watt, after the sustaining without leave to amend of a general demurrer interposed by said defendants to plaintiff's second amended and supplemental complaint, which pleading we will hereafter refer to as the complaint. This action was brought to recover a personal judgment against the above-named defendants, and C. S. Crary, and the defendant Mercantile Building-Loan Association. Since the commencement thereof C. S. Crary has died and the action against the Mercantile Building-Loan Association has been dismissed. Neither the estate of C. S. Crary nor the defendant Mercantile Building-Loan Association is concerned in this appeal. The action was brought to recover the price of certain labor and use of machinery and equipment furnished by plaintiff and to foreclose a lien under the mechanic lien laws of this state against certain real property described in said complaint as belonging to said defendants. The complaint alleges that said defendants were the owners of the real property upon which it is sought to impress said lien, and that plaintiff between June 18, 1930, and April 5, 1931, at the special instance and request of said Crary and Watt, furnished labor, machinery, and equipment for use in the construction, extension, building and improving roads, trails, reservoirs, and water supply system upon said lands. It is further alleged: "That in the performance of said work of improvement aforesaid, the said C. S. Crary acted, and was acting as a co-owner and as the agent and representative of all the owners of said property, and the said R. P. Watt was acting as a co-owner and as the agent and representative of said C. S. Crary." Then follow allegations as to the agreed and reasonable value of said labor and rental of said machinery and equipment, the amount thereof unpaid, and the filing on June 1, 1933, of its claim of lien in the office of the county recorder in which said real property is situated for said amount unpaid. It is also alleged that at the time said claim of lien was filed as aforesaid the said work of construction, extension, building, and improving of said roads, trails, reservoirs, and water supply system upon said lands had not been completed but was continued to be and was still being carried on and that no notice of completion of said work and improvement of said work had been filed for record. Continuing, it is alleged in said complaint that by agreement of the parties, plaintiff executed dismissals as to certain parcels of said lands without prejudice to plaintiff to prosecute this action against the above-named defendants, and that C. S. Crary prior to his death executed promissory notes covering said indebtedness, but said notes were given and accepted merely as evidence of indebtedness and not as payment thereof. The complaint closes with a prayer for a personal judgment against the defendants for the amount due and unpaid, that the same be decreed to be a lien upon said lands and improvements, and for a foreclosure of said lien and for general relief.

[1, 2] We think it conclusively appears from the foregoing that plaintiff's complaint states a good cause of action for labor and rental of the equipment and machinery of plaintiff against all of the defendants, including the three respondents. This being so, the complaint is good as against a general demurrer. The complaint contains express allegations that the labor was performed for and the equipment furnished to the defendants through their agent and co-owner Crary, by the plaintiff, and that defendants failed to pay for the same. While the action purports to be one for the foreclosure of a lien, still if the allegations are insufficient to show the plaintiff entitled to a lien, but do state a good cause of action against the defendants for labor furnished and for rental of equipment, the pleading is not subject to attack by general demurrer. This principle of law is so well established that no citation of authority to support it is necessary.

[3] Defendants' brief is devoted principally to the question as to whether said plaintiff under the allegations of its complaint has shown that it was entitled to a lien upon the real property described therein for the labor and rental of said equipment and machinery. In contending that the allegations of the complaint are insufficient to establish plaintiff's claim to such lien, defendants make the following argument: The complaint shows that plaintiff is an original contractor and that under section 1187 of the Code of Civil Procedure every original contractor claiming a lien must within sixty days after the completion of the contract file his claim of lien; that the complaint shows that plaintiff completed its contract on April 5, 1931, and that it did not file its claim of lien until June 1, 1933, more than two years after it had completed its contract. Therefore defendants contend that the complaint shows that plaintiff failed to file its claim of lien within the time provided by this section of the code. This section further provides for the filing of a notice of completion and that in case said notice is not filed, "all persons claiming the benefit of this chapter, shall have ninety days after the completion of said work of improvement within which to file their claims of lien." Just what bearing these provisions of the section may have upon plaintiff's right to a lien presents a nice question of law. But this question cannot be raised by defendants under their general demurrer and we expressly refrain from passing upon it. Having held the complaint sufficient, whatever discussion we might indulge in relative to these other matters would be mere dictum.

[4] Defendants make reference to the fact that plaintiff accepted the promissory notes of C. S. Crary, and intimate that by so doing the plaintiff waived its right to recover in this action, or at least waived its right to a lien. The complaint states that the notes were taken as evidence of the indebtedness and not by way of pay-

ment. The law is clear that such acceptance does not constitute the waiver of plaintiff's right to a lien. Neither would it affect plaintiff's right to a personal judgment against said defendants. Hammond L. Co. v. Richardson Bldg., etc., Co., 209 Cal. 82, 285 P. 851; Giant Powder Co. v. Fidelity & Deposit Co., 214 Cal. 639, 7 P.(2d) 1023.

[5] Finally defendants contend that it appears from the face of the complaint that plaintiff's cause of action is barred by the statute of limitations. As defendants' demurrer was a general demurrer, and did not specifically point out this ground, defendants may not avail themselves of the benefit of the statute of limitations. 16 Cal. Jur. 608, 609.

For the reasons herein stated, the judgment is reversed, with directions to the trial court to overrule the demurrer of the defendants.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; PRESTON, J.

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4 Cal.2d 432

TREZONA v. TICKELL et al.

Sac. 4912.

Supreme Court of California.

Sept. 30, 1935.

1. Waters and water courses ⇒231

Description of property in assessment by irrigation district must be such as to afford owner means of identification.

2. Waters and water courses ⇒231

Erroneous element in description of property in assessment by irrigation district, which may be disregarded and still leave sufficient description, and which has not misled owner, will not invalidate proceedings.

3. Waters and water courses ⇒231

Description of property sold to meet assessment of irrigation district as "Quartz Mining Claim formerly known as the Sneath & Clay, being Mineral Lot No. 73 except portion of surface thereof in W½ in Sec. 1, Tp. 16 N., R. 9E," acreage being given as 20.72, *held* adequate to validate proceedings, where actual acreage was 20.33, and land was in section 18, since designation of section number was unnecessary for identification and statute required only estimate of acreage (Gen. Laws 1931, Act 3854, § 35).

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by Charles E. Trezona against A. H. Tickell and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Vernon Stoll, of Grass Valley (Harry A. Encell, of San Francisco, of counsel), for appellant.

Lynne Kelly, of Grass Valley, C. F. Metteer, of Sacramento, and Nilon, Hennessy & Kelly, of Grass Valley, for respondents.

LANGDON, Justice.

This is an action to quiet title and cancel a tax deed. Defendant had judgment, and plaintiff appealed.

Plaintiff was the owner of a mining claim in Nevada county. In 1929, the Nevada Irrigation District levied an assessment against the property in the sum of $3.15. This was not paid, and a sale was had, following which the district gave a deed of the property to defendant. Plaintiff claims that the proceedings were invalid and that the deed is void because the property was not correctly described in the assessment.

The assessment described the land as "Quartz Mining Claim formerly known as the Sneath & Clay, being Mineral Lot No. 73 except portion of surface thereof in W ½ in sec. 1, Tp. 16 N., R. 9E." The acreage was given as "20.72."

The actual acreage of the property was 20.33, and the land was in section 18, not section 1. Plaintiff contends that these errors invalidate the proceedings. In our opinion they do not.

[1, 2] The description of the property in an assessment by an irrigation district must be such as to afford the owner the means of identification, and must not be calculated to mislead him. An erroneous element, such as a false call, which may be disregarded and still leave a sufficient description, and which has not probably misled the owner, will not invalidate the proceedings. Jacoby v. Wolff, 198 Cal. 667, 247 P. 195; Reclamation Dist. No.

⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

673 v. Diepenbrock, 168 Cal. 577, 143 P. 763; Best v. Wohlford, 144 Cal. 733, 736, 78 P. 293; Bosworth v. Danzien, 25 Cal. 296. The acreage, under section 35 of the California Irrigation District Act, need only be an estimate. 2 Deering's Gen. Laws, 1931, Act 3854, p. 1979.

[3] In the instant case several qualified experts, two surveyors and an abstractor of tiles, testified for defendant. It appears from their testimony that the land in question was commonly known by the descriptive name of "Sneath and Clay Quartz Mining Claim"; that any qualified surveyor could identify it by such name; that in the county books of patent records it is designated as "Mineral Lot Number 73," and its boundaries are described in such records; that it is the practice of the United States Land Department to use a particular mineral lot number only once in a township; and that there is no other lot 73 within the township and range in which the land is located.

In the light of the authorities cited above, the property was adequately described by its common name and mineral lot number; the designation of the section number was unnecessary for identification, and the error therein could not have misled plaintiff. The proceedings were therefore valid and the deed to defendant was not void.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.

* * *

4 Cal.2d 352

HEYWOOD v. SOOY.

S. F. 15380.

Supreme Court of California.

Sept. 24, 1935.

Appeal and error 🔑80(4)

Decree in action for partnership accounting after voluntary dissolution which adjudged that no complete accounting could be had until unfinished partnership business was concluded was "interlocutory decree" reserving matters for future adjudication before entry of final decree, and appeal therefrom would be dismissed.

[Ed. Note.—For other definitions of "Interlocutory Decree or Judgment," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by John Guthrie Heywood against Charles H. Sooy. From the decree, the defendant appeals.

Appeal dismissed.

Fred L. Berry and G. G. Sanders, both of San Francisco, for appellant.

J. H. Sapiro, Gregory A. Harrison, and A. A. Heer, all of San Francisco, for respondent.

WASTE, Chief Justice.

Plaintiff and respondent move to dismiss an appeal by defendant from an alleged nonappealable order. The action is one for a partnership accounting after voluntary dissolution, appointment of a receiver, and determination of all property rights of the interested parties. After findings made, the trial court entered an "Amended Interlocutory Decree" in which it was adjudged that an accounting be had, fixing the interests of the parties in "three particular matters of the firm's copartnership business in controversy," and finally determining and setting out each one with particularity and the amounts each party is to pay in the accounting, but, as "unfinished business of said firm which has yet to be concluded before a final accounting may be had," the court reserved these matters "until such time and after such proceedings had that the court can make a final determination hereof and a final decree herein." Payment by either of the parties of any money, except as in the decree provided, is directed to "await the further order of the court."

We cannot escape the conviction that the decree as entered was not intended to be, and is not, a final decree. The plain reading of the language of the decree leaves no doubt on that question as presented by the appeal. No receiver is appointed, should that be deemed by the trial court to be necessary, and no complete accounting can be had until the matter of the partnership found by the court to be in the state of "unfinished business" can be adjusted. A plainer case of an interlocutory decree reserving other matters for future adjudication before the entry of a final decree can hardly arise.

While citation of authority seems unnecessary, we refer to the following: Hollar v. Saline Products, Inc., 43 P.(2d) 273; Gunder v. Gunder, 208 Cal. 559, 282 P. 794; see, also, Security-First Nat. Bank v. Superior Court, 132 Cal. App. 683, 23 P. (2d) 1055.

The appeal of the defendant is dismissed.

We concur: SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.

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4 Cal.2d 434

OLSON v. OLSON.

S. F. 15122.

Supreme Court of California.

Sept. 30, 1935.

Rehearing Denied Oct. 28, 1935.

1. Trusts 🔑44(3)

In suit to impress trust upon real property which plaintiff had conveyed by deed of gift, plaintiff had burden to establish by clear and convincing evidence claim that deed had been executed in reliance upon promise of grantee to subsequently restore title to former status.

2. Appeal and error 🔑1012(1)

Judgment may not be reversed for insufficiency of evidence where evidence is in conflict, although it may seem to be against weight of evidence, and Supreme Court, if sitting in place of trial judge, might have found facts differently.

3. Trusts 🔑44(2)

In suit to impress trust upon real property which had been conveyed by plaintiff by deed of gift, evidence *held* to support judgment for defendant.

4. Marriage 🔑67

Washing machine which had been given by husband to wife as Christmas gift before annulment of marriage but which remained in possession of husband at time of his death *held* separate property of wife, who was entitled to possession as against sole heir at law of former husband.

5. Marriage 🔑67

Ownership of personal property which had been purchased jointly by husband and wife and which was left in possession of husband after annulment of marriage until his death *held* vested equally in former wife of deceased and sole heir at law.

6. Property 🔑9

Where evidence was uncontroverted that husband and wife had purchased personal property which remained in possession of husband after annulment of marriage until his death, statutory presumption of ownership arising from exercise of acts of ownership over property *held* inapplicable (Code Civ. Proc. § 1963, subd. 12).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Milda Fagerstrom Olson against Johanna Olson, individually and as administratrix of the estate of Werner M. Olson, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed in part, and reversed, with directions, in part.

Lloyd Macomber, of San Francisco, for appellant.

Edward R. Solinsky, of San Francisco, for respondent.

CURTIS, Justice.

This is an action to impress a trust upon real property, and to recover possession of personal property. The real property consists of a dwelling house in San Francisco and the personal property consists of the furnishings in the dwelling.

The facts are somewhat unusual. The real property was acquired by Werner Olson and Milda Olson as husband and wife in 1924, the purchase price being paid from the earnings of both of them, and the title being taken in their names as joint tenants. It appears from the record that the furnishings were likewise paid for from the joint earnings of both of them with the exception of a washing machine which it is claimed was a Christmas present from the husband to the wife. In May, 1929, Milda Olson, having saved up enough from her own earnings to make a trip to Sweden to visit her parents, made a deposit of some $400 with a steamship company but discovered upon making application at the Swedish consulate for a passport that because her husband had come from Canada and was not a naturalized American citizen that there might be considerable difficulty in procuring the passport and that, in fact, it might take so long that her deposit with the steamship company might be forfeited. Distressed by this turn of affairs she talked the situation over with a close friend, who advised her to see a lawyer. This attorney, so Milda Olson testified, advised her to have the marriage annulled, which would leave her a Swedish subject, and would remove any obstacle to securing her passport, and upon her return from Sweden she could remarry. This ill-advised counsel was carried out, and on May 9, 1929, the complaint in annulment was filed, and the decree of annulment entered the following day. The grounds of annulment were that the ceremony had been performed by a person not properly authorized to perform such ceremony. Milda Olson left for Sweden on May 22, 1929, and remained there several months visiting her mother and friends and relatives. In July, so Milda Olson testified, she received a letter from Werner Olson stating that the encumbrances on the property would have to be renewed in September and that he would have to raise the money from some source to refinance the property, and asking her to sign a gift deed which he inclosed conveying to him outright her share of the real property held in joint tenancy by both of them, and assuring her that as soon as he had properly refinanced the property he would restore the title to its former status of joint tenancy between them. Milda Olson signed the gift deed and forwarded it to Werner Olson, who recorded it and made arrangements for the refinancing of the property. Upon her return from Sweden in October, 1929, they were not remarried, and on May 15, 1930, he died suddenly of pneumonia after an illness of less than a week, leaving no will, and with the real property standing of record in his name. Thereafter his mother, Mrs. Johanna Olson, as his sole heir at law, applied for and received letters of administration. As such administratrix she paid out in the payment of estate claims and expenses an amount considerably more than the amount she took in. The second deed of trust was paid by the administratrix in full and there has been presented and filed a claim against the estate upon the first deed of trust held by the Bank of America in the sum of $2,150. This action was commenced after the filing of the first and final account and petition for final distribution of said estate and said matter has been withdrawn pending the outcome of this litigation. At the trial Milda Olson was unable to produce the letter which she claimed had been written by Werner Olson to her while she was in Sweden containing the promise that if she would convey the property to him by a gift deed he would, after the property was refinanced, restore the title to its former status of joint tenancy. In the absence of such letter, the question of whether or not such promise was in fact made depended solely upon the uncorroborated testimony of Milda Olson. The trial court found against her in favor of the defendant, Johanna Olson, mother of Werner Olson, with reference to both the real and personal property, and judgment was entered accordingly. From said judgment, this appeal is prosecuted.

[1-3] With reference to the real property, we can see no escape for the appellant from the predicament in which she finds herself. The burden was upon her to establish by clear and convincing evidence that a promise was made to her by Werner Olson to subsequently restore the title to its former status and that in reliance upon such promise she executed the deed in question. She was unable to produce the letter which she claimed contained the promise and relied solely upon her own testimony to support her contention. It is apparent that the trial court did not deem this sufficient, and found against her. In view of the fact that the only person who could successfully contradict her testimony was dead, the trial court was justified in considering her uncorroborated testimony as weak and unsatisfactory. The case therefore resolves itself into one involving a conflict in evidence, and an appeal from the judgment is necessarily futile. There are certain circumstances surrounding the giving of the deed of gift which tend to substantiate appellant's testimony, as, for example, the fact that there was need for a refinancing of the property at the time the deed was given. However, the fact that a judgment may seem to an appellate court to be against the weight of evidence, or that the appellate court sitting in the place of the trial judge might have found the facts different, will not avail to obviate the ap-

plication and operation of the rule that a judgment may not be reversed when the evidence of the whole case is in conflict. Waer v. Waer, 189 Cal. 178, 180, 207 P. 891. The deed of gift, a written instrument, signed and acknowledged by appellant, and unimpaired by any presumption of undue influence arising out of a marital relation between the parties, was entitled to the full credit given to it by the trial court, and, standing alone, furnishes sufficient support for the findings of the trial court upon which the judgment with reference to the real property was predicated.

[4-6] It is to be noted, however, that with reference to the personal property, consisting of the furnishings of said dwelling, which originally cost approximately $1,000, the situation is entirely different, inasmuch as no written instrument, or evidence of any kind, is offered to prove that this property, originally belonging to Milda Olson and Werner Olson, ever became the sole and separate property of Werner Olson. With reference to the washing machine, the evidence is unequivocal and uncontradicted that it was a Christmas present and therefore an outright gift to Milda Olson from Werner Olson. It is obvious, therefore, that said machine is the separate property of Milda Olson and she is entitled to its possession. Likewise, the evidence is unequivocal that the other personal property consisting of the furnishings of said home were purchased jointly by Milda Olson and Werner Olson and were paid for from the earnings of both parties. Receipted bills made out in the name of Milda Olson by the furniture company from whom said furniture was purchased were introduced in evidence. In fact, no claim is made by respondent that said personal property was not originally bought and paid for by both Milda Olson and Werner Olson. No division was made of this property at the time the annulment was secured. Hence, at the time of Werner Olson's death, ownership thereof was equally vested in both of them. Milda Olson is therefore entitled to a certain share as her own separate property and Johanna Olson is entitled to a share as the sole heir at law of Werner Olson. We are of the opinion that, under the circumstances, an equal division of the furnishings, excluding the washing machine, which as we have seen belongs wholly to Milda Olson, would be a fair and proper division of the personal property.

Respondent seeks to support the finding of the trial court whereby the entire personal property was allocated to Johanna Olson as the sole and separate property of Werner Olson upon the supposition that because, after Milda Olson's return from Sweden, Werner Olson remained in the family dwelling house for several weeks, subsequent to the time Milda Olson moved out, before renting the house and moving in with his mother; Werner Olson was in possession of such personal property at the time of his death, and such possession imported ownership. In view of the fact that there is no real dispute as to the actual ownership of the personal property by virtue of the unequivocal nature of the evidence that the property was purchased and paid for by Milda Olson and Werner Olson jointly (with the exception of the washing machine which was paid for by Werner Olson and given as a Christmas present to Milda Olson), no occasion arises for the application of the disputable presumption that a person is the owner of property from exercising acts of ownership over it. Section 1963, subd. 12, Code Civ. Proc.

It is unfortunate that in view of the small amount involved herein, since the excess of the value of the real property after the payment of the encumbrances against it is small and the entire value of the personal property is not over $1,000, that a satisfactory compromise could not have been worked out between the parties and the cost of this litigation avoided.

Judgment is affirmed in so far as it affects the real property. In so far as it affects the personal property, judgment is reversed, with directions to the trial court to enter judgment in accordance with the views herein expressed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

4 Cal.2d 363

McCLERKIN v. SAN MATEO SCHOOL DIST. et al.

S. F. 15397.

Supreme Court of California.
Sept. 26, 1935.

1. Schools and school districts ⚷154

Children in one school district who had consent of trustees of neighboring school district in same county and of county superintendent of schools to attend neighboring school district *held* entitled to attend neighboring school district without consent of trustees of their resident school district (School Code, § 2.20, and § 2.21, as added by St. 1929, c. 63; § 3.174, as amended by St. 1933, p. 577; § 4.760 et seq., as added by St. 1931, p. 2513, § 2, as amended by St. 1933, p. 2702).

2. Schools and school districts ⚷159

Where children in one school district attended school in neighboring school district with consent of trustees of neighboring school district and of county superintendent of schools, school district of attendance *held* entitled to receive and retain moneys payable out of state school fund based upon attendance of such nonresident pupils (School Code, § 3.174, as amended by St. 1933, p. 577; § 4.760 et seq., as added by St. 1931, p. 2513, § 2, as amended by St. 1933, p. 2702).

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In Bank.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Juliet McClerkin, an infant, by G. M. McClerkin, as her guardian ad litem, against the San Mateo School District and others. From a judgment declaring the rights and duties of all the parties, the San Mateo School District and Pansy Jewett Abbott appeal.

Judgment affirmed.

Gilbert D. Ferrell, Dist. Atty., and D. E. Sullivan, Asst. Dist. Atty., both of Redwood City, for appellants.

Bronson, Bronson & Slaven, of San Francisco, for respondent McClerkin.

Thomas H. Breeze, of San Francisco, for respondent Hillsborough School Dist.

SHENK, Justice.

The plaintiff, a minor, resides in Baywood in San Mateo county. Baywood is within the territorial confines of San Mateo School District, which is an elementary school district. During the four years prior to the commencement of the action, the plaintiff attended the elementary school in Hillsborough School District, also in San Mateo county. About twenty other children who reside in Baywood in San Mateo School District attended the elementary school in Hillsborough School District prior to the commencement of the action. The attendance of such children at the latter school was with the consent of the trustees of Hillsborough School District, but without the consent of the trustees of San Mateo School District. In January, 1934, the trustees of San Mateo School District withheld their consent to the attendance at the Hillsborough school of the children residing in Baywood, and contended that the attendance of the children at the Hillsborough school without their consent should not deprive the San Mateo School District of its apportionment of moneys from the state school fund based upon the school attendance of such children. This action was brought by the plaintiff on behalf of herself and said twenty other children against San Mateo School District, Hillsborough School District, and Pansy Jewett Abbott, as superintendent of schools of San Mateo county, for a declaration of the rights and duties of all the parties. The trial court held that the children were entitled to attend the Hillsborough school with the consent of the trustees of Hillsborough School District and the consent of the county superintendent of schools of San Mateo county; that the consent of the trustees of San Mateo School District was unnecessary, and that when the attendance of such children at the Hillsborough school was with the consent of the trustees of Hillsborough School District and of the San Mateo county superintendent of schools, San Mateo School District was not entitled to credit for apportionment of any funds allotted to Hillsborough School District out of the state school fund by virtue of the attendance of such children at the Hillsborough school. Judgment was entered accordingly. The defendants, with the exception of Hillsborough School District, have appealed.

For the purpose of submitting the issues to the trial court, it was stipulated that the defendant county superintendent of schools gave her consent to the attendance of the children at the Hillsborough school. Two questions only are now presented. First, whether the consent of the trustees of San Mateo School District is a requirement before the children residing in that district may attend a school in another district; and secondly, whether the school district of attendance may receive and retain moneys payable out of the state school fund based upon the attendance of such nonresident pupils.

Those questions depend for their answer upon the interpretation of the applicable sections of the statutory law. Section 2.20 of the School Code (chapter 23, Stats. 1929), provides: "One school district may perform school services for another school district or districts, and receive pay from the other school district for the performance of such school service, whenever a contract approved by the county superintendent of schools covering the performance of such school service and the payment therefor has been entered into by and between the governing boards of the two school districts concerned." Section 2.21 (chapter 63, Stats. 1929), reads: "The attendance of pupils from a school district of any type and class which has contracted to have its children educated by another school district, as provided elsewhere in this code, shall be kept separate, and shall be credited to the district in which such pupils reside." By the provisions of section 1 of chapter 63, sections 2.20 and 2.21 comprise article 2, of chapter 1, part 1, div. 2, of the School Code, on the subject of Administrative Organization, article 2 treats of "Performance of Services by One District for Another District."

[1, 2] There was no contract entered into between the districts here involved. In the absence of any power or privilege directly conferred on one district to educate children resident in another district, the consent of the district of residence would seem to be a prerequisite before it may be said to have released its right to benefits to which it otherwise would become entitled. "System of Public Instruction" is the subject-matter of division 3 of the School Code (section 3.1 et seq.). Part 2 thereof (section 3.110 et seq.) and chapter 2 of that part (section 3.160 et seq.), contain provisions affecting "Elementary Schools." Article 3 of chapter 2 (section 3.170 et seq.) is on the subject of "Admission." Prior to 1933, section 3.174, contained within that article, provided: "Boards of trustees and city boards of education shall have power, and it shall be their duty to permit children from other districts to attend the schools of their district. Should they refuse to grant such permission, the parents or guardians of the children may appeal to the county superintendent of schools and his decision shall be final and binding on both boards of trustees." In 1933 (Stats. 1933, p. 577), said section 3.174 was amended to read as follows: "Boards of trustees and city boards of education shall have power to permit children from other districts to attend the schools of their district. No pupil shall attend school in a district other than that in which he resides without first obtaining the consent of the county superintendent of schools having jurisdiction over the district in which such pupil resides." It thus appears that prior to 1933 it was made the duty of the board of trustees of one district to permit children from another district to attend its schools, and a decision of the superintendent of schools was necessary only in case of a refusal of the receiving district. Since the amendment in 1933, and at the time this controversy arose, boards of trustees were vested simply with the power to permit children from another district to attend their schools, without imposing upon them the duty to permit such attendance. At the same time the consent of the county superintendent of schools having jurisdiction of the district of residence was made a prerequisite. There is no specific requirement in the Code that attendance in one district of children residing in another district, when it is pursuant to section 3.174, shall be credited to the district of residence. The provisions of section 2.21 expressly refer solely to section 2.20, and can have no necessary implied relationship to section 3.174. Whatever doubt may have surrounded this question prior to the amendment of section 3.174 in 1933, by reason of the then duty imposed on the district of attendance, does not now obtain. It seems clear that said amendment was intended to remove any such doubt. There is no express provision in the chapters of the School Code dealing with the apportionment of the state school fund to elementary school districts (Stats. 1931, p. 2514, as amended Stats. 1933, p. 2702), which differentiates between attendance of nonresident and resident pupils, and in the absence of a contract between the districts, we find no other provision from which it may readily be implied that the district of attendance is not

entitled to credit for the attendance of pupils from another district. That attendance must be with the consent of the county superintendent of schools having jurisdiction of the school district of residence, and the consent of the board of trustees of the latter district is not required. Whether such consent should be required is a matter of legislative policy. The law as enacted determines the policy and necessarily governs. It was apparently considered by the Legislature that the interests of the school district of residence were safeguarded if in all cases the decision be made by the county superintendent of schools under whose jurisdiction it operated. If the county superintendent of schools deemed it wise or expedient that the districts enter into the contract contemplated by section 2.20 of the School Code, and that state aid in such a case be subject to division in accordance with a contract which would receive his approval, he could properly withhold his consent. The requirement of his consent, in the absence of such a contract, would necessarily result in according to the district of attendance the benefit of state aid based on such attendance.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.

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4 Cal.2d 399

HERRSCHER v. STATE BAR OF CALIFORNIA.

S. F. 15401.

Supreme Court of California.

Sept. 30, 1935.

Rehearing Denied Oct. 28, 1935.

1. Attorney and client ⚷57

In reviewing recommendations of Board of Governors of State Bar in disciplinary cases, Supreme Court is not bound by rule that findings based on substantial evidence are binding on appellate court, since board acts as administrative arm of Supreme Court, which will approve or disapprove board's findings depending upon court's opinion as to weight of evidence.

2. Attorney and client ⚷44(1)

Attorney's gross overcharge for services rendered can under some circumstances constitute an offense warranting discipline.

3. Attorney and client ⚷44(1)

Charging excessive fee will not of itself warrant discipline of attorney, but ordinarily propriety of fee charged should be left to civil court in proper action.

4. Attorney and client ⚷44(1)

Neither Board of Governors of State Bar nor Supreme Court should attempt to evaluate attorney's services in quasi-criminal proceeding, where there has been no failure to disclose to client true facts or no overreaching or fraud on part of attorney.

5. Attorney and client ⚷53(2)

In disbarment proceeding for charging exorbitant fees, no adverse or favorable inferences could be indulged as result of attorney's restitution of moneys received, where restitution was made solely in interests of expediency in relation to another case and under pressure.

6. Evidence ⚷154

In disbarment proceeding, photostatic copies of documents which were secured illegally by private detective by unlawful entry of attorney's office at night *held* properly admitted.

7. Attorney and client ⚷57

In disbarment proceeding, in weighing illegally secured evidence against attorney, Supreme Court would take into consideration background of charges indicating personal spite.

8. Attorney and client ⚷53(2)

Evidence *held* not to sustain findings of Board of Governors of State Bar that attorney charged exorbitant fees for services rendered during certain period, that attorney knew that client was insane, that attorney obtained contract for fees from client's guardian by fraud, or that attorney had knowledge of secret profits realized in purchase of furniture for his client so as to justify attorney's disbarment.

In Bank.

Petition by Edmond E. Herrscher against the State Bar of California for review of findings of Board of Governors of the State Bar recommending petitioner's disbarment.

Proceedings against petitioner ordered dismissed.

Rehearing denied; SHENK, J., voting for modification.

John L. McNab, of San Francisco, for petitioner.

Joseph C. Sharp, of San Francisco, for respondent.

PER CURIAM.

The petitioner herein, Edmond E. Herrscher, has filed this proceeding for a review by this court of the findings of the Board of Governors of the State Bar, recommending his disbarment on three separate charges.

Herrscher was originally charged with five different acts of misconduct, all growing out of his relationship as attorney for Mr. and Mrs. James W. Perry, of New York. The local administrative committee that heard the evidence recommended the dismissal of three of the charges, found two of the charges sustained, and recommended Herrscher's disbarment. The Board of Governors agreed with the administrative committee as to the two charges found sustained by the evidence, but disagreed with the committee as to one of the charges which the committee had found to be without merit. The board dismissed the other two charges.

[1] In reviewing the recommendations of the Board of Governors in these disciplinary cases, the rule is now well settled that this court is not bound by the rule that findings based on substantial evidence are binding on an appellate court. In such proceedings, the Board of Governors acts as an administrative arm of this court, and the court will approve or disapprove the board's findings, depending upon the court's opinion as to the weight of the evidence. In re Shattuck, 208 Cal. 6, 279 P. 998; In re Petersen, 208 Cal. 42, 280 P. 124; In re Stafford, 208 Cal. 738, 284 P. 670.

[2] Two of the charges upon which the board based its recommendation of disbarment have to do with alleged exorbitant fees alleged to have been charged the Perrys by Herrscher, while the third charge involves an alleged secret profit made by Herrscher at the expense of the Perrys. Inasmuch as two of the charges involve the claim that the attorney has overcharged a client for services rendered, some reference must be made to the state of the law on that subject. There can be no doubt that a gross overcharge can, under some circumstances, constitute an offense warranting discipline. In Goldstone v. State Bar, 214 Cal. 490, 498, 6 P.(2d) 513, 516, 80 A. L. R. 701, this court stated the rule as follows: "Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court."

In that case, a workman, injured in an industrial accident, was ignorant of the fact that an award had been made in his favor. He consulted Goldstone, who examined the files of the commission, discovered the award and accompanied his client to the offices of the insurance company, and so collected the amount of the award, $882.96. For these services, Goldstone charged his client $310. The court held that the receipt of money as payment for services, when none have been in fact rendered, is a species of dishonesty which no court can condone. The court also emphasized that the client was ignorant of his rights and that the fee was so large in comparison with the slight service performed that it would shock the conscience of any to whose attention it was called. The Goldstone Case was not one where reasonable men might differ as to the propriety of the fee, nor was it a case where the client was in a position properly to evaluate the services rendered.

[3] We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action. People ex rel. Colorado Bar Ass'n v. Robinson, 32 Colo. 241, 75 P. 922; Grievance Committee v. Ennis, 84 Conn. 594, 80 A. 767; People ex rel. Chicago Bar Ass'n v. Pio, 308 Ill. 128, 139 N. E. 45. As was said by the Washington court in Re Wiltsie, 109 Wash. 261, 186 P. 848: "The board also found, as one of the grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the

fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited."

In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees. State v. Barto, 202 Wis. 329, 232 N. W. 553; State Board of Law Examiners v. Sheldon, 43 Wyo. 522, 7 P.(2d) 226; annotation 80 A. L. R. 706.

[4] Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. It is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present.

With these preliminary remarks, we turn to a résumé of the evidence. The record here presented for review is an extremely bulky one, consisting of over 1,300 pages of reporter's transcript and hundreds of pages of exhibits. Obviously, the reference to the facts must be brief.

Herrscher's first connection with the Perrys occurred in March, 1929. Perry, at that time, was a wealthy man, possessing a fortune of over a million dollars. For many years he had been connected with the Johns-Manville Company, starting in minor positions and ultimately becoming vice president and director, at an annual salary of $36,000. In 1927, the company was reorganized and Perry was discharged. In 1928, he visited California and purchased extensive properties at Pebble Beach, where he started construction of an elaborate and expensive home. It was apparently the intent of the Perrys to make California their home. One factor inducing them to come to California was undoubtedly their health. Mr. Perry was not in good health and Mrs. Perry was suffering from an apparently incurable malady known as Paget's disease. Another motivating factor, at least so far as Mrs. Perry was concerned, was to get Mr. Perry away from his New York mistress, with whom Perry had been intimate for many years.

On the 1929 trip, the Perrys sailed from New York on the steamship Virginia, with a large retinue of servants and several relatives, in the best accommodations money could buy. En route, the Virginia stopped at Havana. Over the strong protests of Mrs. Perry, Mr. Perry purchased an assortment of liquor and placed the same in his automobile. When the boat docked in San Francisco, in March of 1929, some one reported the presence of the liquor in the car to the customs officials and the car was seized by the government. Perry tried through friends to get the car released, but was unsuccessful. He apparently feared prosecution under the Jones Act (see 27 USCA §§ 91, 92). He discussed his troubles with a person by the name of Macgrueder, a bootlegger, who was then supplying him with liquor, and Macgrueder recommended that Herrscher be retained. Herrscher testified that he knew Macgrueder socially, but did not then know that Macgrueder was a bootlegger. Perry requested Macgrueder to take the matter up with Herrscher, which was done. Macgrueder and Herrscher, at Perry's request, visited the latter at Pebble Beach. Several days later, Perry visited Herrscher, at the latter's office in San Francisco. Perry discussed with Herrscher the difficulties in which he was involved with the government, and also discussed his general affairs. He told Herrscher to get him out of his troubles and didn't care what it cost. On the next day, March 23d or 24th, Perry again visited Herrscher and definitely retained him. There is a dispute as to whether Herrscher was generally retained at that time or whether he was retained solely in the automobile transaction. The correspondence between Herrscher and Perry, and particularly the language used in the bills sent Perry by Herrscher, indicate that Herrscher was generally retained. We are inclined to believe that the weight of the evidence indicates that Herrscher was generally retained and was not retained solely in reference to the car. Herrscher immediately associated Sam Shortridge, Jr., and, within a very short time, secured the release of the automobile, without criminal prosecution, upon Perry paying a $900 fine. Shortridge was paid $4,000 by Herrscher for his services; this sum being paid from the fees paid Herrscher. Immediately after securing the release of the automobile, Herrscher began personally to handle a multitudinous number of affairs for Perry. From March to October, 1929, Perry paid Herrscher a sum of money that is in dispute. The administrative committee found this sum to be, in accordance with Herrscher's testimony, $23,000, while the Board of Governors found this sum to be $28,000, in accordance with Perry's testimony. The dispute arose because the first payment of either $15,000 or $20,000 was made in cash. Herrscher's books for 1929 show that $15,000 was received. The charging of the $23,000 or $28,000 during this period, under the circumstances disclosed in the record, constitutes the first grounds of misconduct upon which the Board of Governors based its recommendation of disbarment. The local administrative committee found that, although the fees charged during this period were, in its opinion, "excessive," they were not so large as to be without "reasonable justification" and exonerated Herrscher on this charge. The board also found that these fees were not only excessive, but were exacted from Perry at a time when Herrscher knew that Perry was mentally incompetent.

In November of 1929, the Perrys sailed for Honolulu on their yacht. Upon hearing of the stock market crash of that year, they left their yacht in Honolulu and returned to San Francisco. Perry lost heavily in the market and was mentally upset. Herrscher represented the Perrys from the time of their return to San Francisco until July 2, 1930. On that date, Perry was judicially declared incompetent and Mrs. Perry was appointed guardian of his estate. From July 2, 1930, until his employment terminated in 1931, Herrscher represented Mrs. Perry in her personal capacity and also in her capacity as guardian. In October of 1930, at a time when Perry was well on his way to recovery, Herrscher and his partner, Phillip Ehrlich, entered into a written contract with Mrs. Perry, both in her individual and representative capacities, whereby she agreed to pay them $50,000 for their services, which services were to continue until the termination of the guardianship. This contract and the payments thereunder, as far as the guardianship was concerned, was expressly made subject to the approval of the superior court. Upon the execution of this contract, Mrs. Perry paid Herrscher and Ehrlich $18,000, and executed a promissory note in her personal and representative capacity for the balance of $32,000. The charging of this fee, under the circumstances disclosed in the record, was found by the board to be excessive and constitutes the second charge upon which the board based its recommendation of disbarment. No charges were ever filed against Ehrlich, although the record shows he was a party to the contract, was present when it was signed, and received half of the $18,000.

The third charge of misconduct is based on a furniture transaction with the Perrys, whereby Herrscher is alleged to have made a secret profit of over $4,000. The facts in reference to this third charge will be set forth in detail later in this opinion.

Before considering the merits of the above three charges, some reference must be made to certain collateral matters necessarily connected with the charges herein involved and necessary to be considered in appraising and weighing the evidence.

The record shows that for many years Herrscher had been retained by many substantial clients and had been accustomed to charging and receiving large fees for his services. In 1930, he had been retained by Fannie May Howard to represent her in a certain divorce proceeding against her then husband, Charles S. Howard, Sr., and in negotiations involving the adjustment of property rights amounting to over $20,000,000.

In October of 1930, after the $50,000 contract above mentioned had been entered into, the Perrys returned to New York. About this same time, Mr. Howard hired a private detective, one Eugene Kerrigan, to assist him in discovering anything that might be of advantage in the pending litigation. Kerrigan immediately undertook, on behalf of Howard, a most ruthless investigation of Herrscher. Dictaphones were installed in Herrscher's office and in his hotel rooms, and all conversations held therein were recorded. In some manner, not definitely disclosed in the record, Kerrigan or his operators secretly and without Herrscher's permission, entered Herrscher's offices on many different nights and made photostatic copies of Herrscher's personal and professional papers, including all papers, documents and letters pertaining to Herrscher's employment by the Perrys.

In the meantime, Perry, in New York, was regaining his health and sanity, although he had not yet been restored judicially to sanity. He became dissatisfied with the $50,000 contract above mentioned. In February of 1931, he and his wife visited San Francisco. They discussed their troubles with certain officials of the American Trust Company, and were referred by them to the firm of Brobeck, Phleger & Harrison, of San Francisco. These attorneys were retained by the Perrys to try to adjust matters with Herrscher. Howard Finn, of that office, was actively in charge of the case. Finn hired Kerrigan to check the Perrys' story, which he testified sounded to him like "a dime novel." Finn testified that he did not know that Kerrigan was at that very time investigating Herrscher for Howard. Finn testified, as did Kerrigan, that Kerrigan refused to accept employment in the matter until he (Kerrigan) first secured permission from the firm of McCutchen, Olney, Mannon & Greene, the then attorneys for Howard, to turn over to Finn the documents he had secured as above mentioned while in Howard's employ. Upon this permission being secured, Kerrigan turned over to Finn all the information and material in reference to Perry that he had in his possession.

[5] In the meantime, the Howard negotiations had reached a critical point. A property settlement agreement was pending. Herrscher heard of the arrival of the Perrys and of their desire to discharge him as attorney. He telephoned Finn and made an appointment to see him. He and Ehrlich called upon Finn at a time when Finn did not as yet have Kerrigan's files and offered to co-operate with him and to furnish to him all documents and files in their possession pertaining to the Perry employment. Herrscher was very busy with the Howard negotiations and retained Joseph Webb, San Francisco attorney, to represent him. Webb represented Herrscher in all subsequent negotiations with Finn. Finn threatened to take the Perry case to the courts. Herrscher felt, with some justification, that any difficulties with the Perrys might jeopardize the pending Howard settlement. Finn first demanded the return of the $18,000 received by Herrscher and Ehrlich in October of 1930 and the return of the $32,000 note. On the advice of Webb, these were returned. Herrscher also turned over to Finn certain stock certificates and other properties of the Perrys, properly in his hands as their attorney. Finn was not satisfied. He demanded the return of the $23,000 received by Herrscher in 1929. Webb offered to arbitrate the question of the reasonableness of the fees and offered to let Maurice Harrison act as arbitrator. Finn refused and stated that unless the fees were returned, he would start action. Webb advised against the return of these fees, but Herrscher insisted on returning them rather than to jeopardize the Howard settlement. It was during these negotiations, lasting several weeks, that it was discovered that Perry, in 1929, had paid about $9,000 for furniture, purchased through Herrscher's secretary, Miss Johnson, costing but $5,000. Thus a secret profit of about $4,000 had been made. Webb, William Hayes, office associate of Herrscher, Miss Johnson, and Herrscher all testified that this was the first time that Herrscher knew of this secret profit. After some discussion about this secret profit, according to Webb's testimony, it was agreed to set off this sum against the $4,000 paid by Herrscher to Sam Shortridge, Jr., in the automobile transaction. Under these circumstances, Herrscher returned to the Perrys the full $23,000 received by him. Herrscher paid back the full $18,000 and the $23,000 out of his own pocket, although other attorneys had shares in these fees. The Perrys thus received back every cent they had paid Herrscher for about two years of legal services. The net result, as found by the local administrative committtee, "has been a gross underpayment or no payment at all * * * for admittedly arduous and competently handled services." The committee also found that:

"In arriving at the foregoing findings of fact and conclusions, the committee has in no way given consideration to the intimation that the restitution by respondent of fees collected from the Perrys implied knowledge or belief of the impropriety of his conduct. As a matter of fact, the committee is of opinion that even at the hearing respondent saw nothing improper in the charges he made and exacted even from Mrs. Perry. His motive in restoring this money was purely and simply a practical consideration as to what would be the effect of publicity at the time upon the more important Howard litigation.

"On the other hand, the committee sees no ground for leniency in the fact this money has been restored and that the net result has been a gross underpayment or no payment at all to respondent, for admittedly arduous and competently handled services. This restitution was not made in the spirit of regret for a wrong done, or by reason of a desire to right an injury. It was made solely in the interests of expediency and under pressure. Respondent is not entitled to any credit therefor, and has received none in the recommendations here made."

We agree with these findings. No adverse or favorable inferences should be indulged as a result of the restitution of the moneys received.

After full restitution had been made, mutual releases were executed by the Perrys and Herrscher. The Perrys paid $7,000 to Brobeck, Phleger & Harrison and $2,500 to Kerrigan for their services, and returned to New York. Before leaving, they expressed to one noninterested witness their complete satisfaction with the result of their visit. They left, apparently completely satisfied, as well they might, having received about two years of legal services for nothing.

Within a few days after the Perry settlement was made, Herrscher and his associate counsel settled the Howard case, Herrscher's client receiving a property settlement of about two and one-half million dollars. For his services in this case, Herrscher received $60,000. Kerrigan testified that upon the settlement of the Howard case and the securing of a divorce by Mrs. Howard, his employment with Howard, Sr., terminated.

Shortly thereafter, Herrscher left for a trip to Europe, accompanied by his mother and Mrs. Howard. It was rumored that upon Mrs. Howard securing her final decree she and Herrscher intended to marry. In October of 1931, while Herrscher was still in Europe, Mrs. Howard's sons, Lindsay Howard and Charles Howard, Jr., employed Kerrigan to renew his investigations of Herrscher, with instructions to gather evidence that might be used to prevail upon their mother not to marry Herrscher. Kerrigan again began his ruthless investigations, employing the same reprehensible methods above described. Apparently the only questionable transactions that these most intensive investigations disclosed involved the Perry relationship.

In March of 1932, while Herrscher was still in Europe, Perry, now judicially restored to sanity, returned to San Francisco. Although both Perry and Kerrigan denied it, the inference is clear that Perry made this trip at the instigation of Kerrigan and the Howards. Upon his arrival in San Francisco, Perry interviewed Howard, Sr., and Kerrigan. The next day, accompanied by Kerrigan, he visited the district attorney for the purpose of preferring criminal charges against Herrscher, based on the furniture transaction. Also accompanied by Kerrigan, Perry visited the offices of the State Bar and Kerrigan "aided" Perry in drafting the formal charges. In fact, after charges were filed with the State Bar, Kerrigan was the sole witness to appear before the preliminary committee of the State Bar, and it was upon his testimony alone that the formal charges forming the basis of this proceeding were made. All during this period, Kerrigan was in the employ of the Howard boys and was not being paid by Perry. The grand jury, through the intervention of Webb, refused to indict Herrscher during his absence and, upon his return and appearance before that body, dismissed the charge.

In the meantime, while Herrscher was still in Europe and after the grand jury had postponed consideration of Perry's charges until Herrscher's return, Kerrigan, still in the employ of the Howard boys, went to Europe with his photostatic copies of documents and records of conversations, and visited Mrs. Howard for the purpose of prevailing upon her not to marry Herrscher. Herrscher was present at the interview. Kerrigan disclosed to Mrs. Howard and to Herrscher the records he had and, according to Herrscher's testimony, threatened that if Herrscher continued with his plans to marry Mrs. Howard, he (Kerrigan) would have Herrscher indicted and disbarred. Kerrigan then returned from Europe and, while in New York, visited the Perrys. He returned to San Francisco in May of 1932.

After Herrscher returned from Europe, he and Mrs. Howard were married and are now husband and wife. Kerrigan testified that his employment by the Howards terminated upon his return from Europe. He, however, continued his activities in investigating Herrscher. He testified that, after his employment had ceased with the Howards, he continued his activities not from any desire to assist his former clients (who are alleged to have paid him $30,000), but because his investigations had disclosed to him that Herrscher was not a proper person to be a member of the bar, but was, in fact, a menace to society, and that he desired to assist the bar in cleansing its ranks of one he considered unfit. In this regard, we are heartily in accord with the following finding of the local administrative committee: "The committee is not impressed with the sincerity of Kerrigan's statement that his activities in this matter were influenced by his desire to do the bar a service by purging it of one, who in his opinion, was an unworthy member. It is the committee's opinion Kerrigan's activities were mainly induced by his desire to do a good job for those who, for the purpose of prevailing in their personal desires and for the purpose of securing personal gain and advantage, employed him and paid him large sums of money to harass respondent and to frustrate his objects."

[6] After formal charges had been voted against Herrscher by the preliminary investigating committee of the State Bar, the examiner of the State Bar, in order properly to present his case, advised with Kerrigan and secured from him the records in his possession pertaining to the Perry deal. During the trial before the local administrative committee of the State Bar, the examiner properly conferred with Kerrigan. Except on possibly two occasions, none of the photostatic copies of documents secured by Kerrigan in the reprehensible fashion above described were directly introduced into evidence. However, the examiner made free use of these documents. The record shows that on many occasions he would demand of Herrscher the presentation of documents, the existence of which could be known only because of his familiarity with the documents in Kerrigan's possession. The illegally secured documents were, therefore, used in this proceeding. It should be added that Herrscher freely placed his files and books at the disposal of the examiner and the committee. The examiner is entitled to the highest praise for his able handling and fearless presentation of this case. As was his duty, he presented all the evidence against Herrscher that was available to him, including the information gained from Kerrigan, leaving it to the trial committee to determine the admissibility of such evidence. The trial committee determined that such evidence was admissible. We agree with this determination. It is our opinion, that as a matter of law, such evidence, no matter how secured, is legally admissible. Whatever may be the rule in other jurisdictions, in this state the rule is clear that evidence, even illegally secured is admissible. In People v. Mayen, 188 Cal. 237, 242, 205 P. 435, 437, 24 A. L. R. 1383, the reason for the rule is stated as follows:

"Without at all minimizing the gravity of such offense, or the sacredness of the right of every citizen to be secure in his person, home, and property from any unlawful invasion by the state, it does not follow that the subsequent detention and introduction in evidence of the property thus wrongfully taken constituted error on the trial of the appellant.

"The trespass committed in the wrongful seizure of these personal effects by unauthorized officers, and the subsequent use of the same in evidence on the part of the prosecution, were in legal effect entirely distinct transactions with no necessary or inherent relation to each other.

* * *

"There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained."

And again 188 Cal. 237, at page 251, 205 P. 435, 440, 24 A. L. R. 1383, it is stated: "The Constitution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transom-light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment."

In approving the using of such evidence in this case, this court does not approve or condone the reprehensible and nefarious acts employed in the securing of such evidence, but, in fact, strongly condemns such tactics. In this proceeding, however, we are solely interested in determining whether the evidence, no matter how secured, indicates that Herrscher has committed acts warranting discipline.

[7] Although such evidence is admissible, it is also true that in weighing the evidence produced against Herrscher, we must take into consideration the background of these charges. We have no doubt that from the beginning of this proceeding the Perrys have been mere tools in the hands of Kerrigan, who has used this proceeding as a means of furthering his own selfish and personal designs and to further the designs of his clients. Although Kerrigan was not called as a witness by the State Bar, he was called as a witness by Herrscher and, as such witness and on the advice of counsel, he refused to answer most questions asked him, on the ground that his answer would tend to incriminate him. A reading of the record convinces us that this proceeding was instigated for the purpose of furthering a private grudge and out of personal spite. In weighing the evidence, it is therefore necessary to keep in mind the ruling of this court in Peck v. State Bar, 217 Cal. 47, 51, 17 P.(2d) 112, 113, where it was said: "It is, of course, true that the merits of the charges made do not depend upon the motives of the instigator of the charges; but, on the other hand, it is also true that the State Bar is not to be used as an instrument for the furtherance of private grudges, and that evidence which bears the earmarks of private spite should be scrutinized most carefully and accepted with extreme caution."

See, also, Kilpatrick v. State Bar, 220 Cal. 689, 32 P.(2d) 348.

We turn now to a review of the evidence as to the merits of the three charges.

Turning first to the charge that the $23,000 (or $28,000) fee was so exorbitant as to shock the conscience, it is the theory of the State Bar that, not only was this fee excessive, but that it was exacted from Perry at a time when Herrscher knew that Perry was incompetent. It is rather difficult to follow the reasoning of the Board of Governors on this charge. They find the total fee to be $28,000 and then find that this fee must be divided into two parts—$20,000 for recovering the automobile and $8,000 for the other services rendered. The $8,000 fee is found to be justified. But the board also finds that as one of the elements of the offense charged, Herrscher knew when he collected the $20,000 (on April 11, 1929, some two weeks after he first met Perry) that Perry was "mentally and physically ill." If Herrscher knew that Perry was mentally incompetent on April 11, 1929, he also knew it when he exacted the $8,000 fee and, of course, exacting even a reasonable fee from a man known to be insane would also be reprehensible. Moreover, nearly every act set forth in the briefs of the State Bar in an effort to sustain the finding that Herrscher knew that his client was insane when he collected the $20,000 occurred long after April 11, 1929. We are of the opinion that the board's findings in reference to this charge cannot be sustained. We are of the opinion that the weight of the evidence clearly indicates that the total fees received during this seven-month period cannot be segregated into fees for separate items, but must be considered as one fee for all services rendered during this period. We are further of the opinion that the weight of the evidence sustains the finding of the local administrative committee that the total amount received by Herrscher during this period was $23,000 and that the finding of the board that this sum was $28,000 should not be sustained.

The first payment by Perry to Herrscher was $15,000, paid in cash on April 11, 1929. Of this sum, Herrscher paid Shortridge $4,000, as already stated. On April 23, 1929, Herrscher mailed Perry a statement requesting $5,000 as an "additional retainer." This sum was paid on May 8, 1929. The balance of $3,000 was paid on October 26, 1929, the check being labeled "in full for legal services to date."

An examination of the record indicates to us that the services rendered by Herrscher during this period were of such a character as to warrant the fee charged, and are further of the opinion that the weight of the evidence indicates that Perry, although erratic and extravagant, was not mentally incompetent at this time.

In considering the nature, extent, and character of the services rendered by Herrscher to Perry during this period, some reference must be made to Perry's personal characteristics. The Board of Governors found that Perry was "boastful, arrogant, selfish, conceited, opinionated, domineering, tyrannical, overbearing, dogmatic, obstinate, profane, abusive, irascible, fault-finding, emotional, and of ungovernable temper." This finding is amply supported by the record.

Immediately after securing the release of the automobile in April of 1929, Herrscher undertook to represent Perry in many different matters. In all of them Perry insisted that Herrscher give his personal attention to all of Perry's affairs and refused to permit anything to be done by subordinates. Perry made Herrscher's office his headquarters and had an office there reserved for his personal use, and made full use of the office facilities. Perry was not an ignorant client by any means. He was a retired business executive, accustomed to handling business affairs of great magnitude, a heavy investor in the market, and possessing a fortune of over a million dollars.

One of the important matters handled by Herrscher during this period had to do with Perry's yacht. This yacht had been purchased by Perry for $102,250. In 1929, Perry expended about $150,000 for the upkeep and repair of this boat. Nearly all of this sum was expended under the personal supervision of Herrscher. When Herrscher was first retained, the yacht was in the East. Perry ordered the crew to bring the yacht to California. The crew put in at Miami, Fla., and refused to proceed further unless Perry would pay them an additional $8,000. Herrscher, with the consent of Perry, sent Macgrueder to Florida, and personally instructed and directed Macgrueder in the handling of this difficulty. Macgrueder, under Herrscher's supervision, straightened out this difficulty, and the yacht proceeded towards the west coast. It failed to arrive at San Diego on schedule, whereupon Herrscher, accompanied by Perry, went to San Diego to investigate. Herrscher spent about a week trying to locate the yacht and finally, through the co-operation of the Coast Guard, which Herrscher secured, the boat was located lying idle in the ocean, the crew killing time, hoping to collect another month's salary. Herrscher handled the examination of the crew before the proper board, settled the dispute, hired a new crew, and sent the boat to San Pedro for repairs. Herrscher examined various witnesses before the United States Commissioner and ably and competently settled many claims against the yacht. Through Herrscher's efforts, Perry collected $1,359 from the seller of the yacht; Perry claiming that this sum was due him. Herrscher also secured Perry's admission to the St. Francis Yacht Club, procured a cheaper mooring place for the yacht, and performed many other services too numerous to mention.

Another very important matter handled by Herrscher during this period concerned Perry's mistress. When Perry came to California in 1929, she, apparently at Perry's request, followed him to this state. Herrscher handled all transactions with her, secured her an apartment, supervised its furnishing, paid her sums of money, saw that she was entertained socially, etc. This employment required considerable tact and was admittedly ably and competently handled by Herrscher. Although in several letters addressed to Herrscher and to Perry she indirectly on several occasions threatened Perry, Herrscher handled the situation so tactfully that no legal action resulted.

During this period, Herrscher personally handled (on behalf of Perry) many disputes between Perry and his architects and various contractors, arising out of the construction of the $300,000 home Perry was constructing at Pebble Beach. Herrscher also handled innumerable difficulties between Perry and his servants, hired new ones, and took care of the complaints of those discharged. Herrscher also drew a will for Perry and drew a complicated trust agreement for him, which, however, was never executed.

The above constitutes but a brief reference to some of the services performed by Herrscher during this period.

The State Bar, in support of its recommendation for disbarment of Herrscher for the fees charged in this period, contends that the evidence shows Herrscher knew or should have known that Perry was mentally incompetent at this time. Some reliance is placed on alleged conversations Herrscher is supposed to have had with one McCarthy, one of Kerrigan's operators, in which Herrscher is supposed to have said that Perry was "crazy." McCarthy was a completely discredited witness, all charges based upon his testimony being dismissed by the board. Considerable reliance is placed upon certain letters written by Herrscher to friends of Perry in New York, asking them to use their influence on Perry to induce him to execute a spendthrift trust. In these letters Herrscher emphasized Perry's erratic and extravagant conduct and referred to Perry as acting like a crazy man. We find nothing in the letters but the sincere solicitude of an attorney trying to protect a wealthy, self-willed client against his extravagances. It is quite significant that Dr. Inman, a specialist in nervous diseases, who cared for Perry in November, 1929, after two weeks of observation in the hospital, discharged Perry as sane and testified that Perry was sane during 1929. Perry was, in fact, suffering from a syphilitic condition, which, coupled with the loss of a considerable portion of his fortune and an automobile crash in June of 1930, resulted in his insanity, but Dr. Twitchell, who cared for him in a sanatorium during 1930, testified that it would have been almost impossible for even a doctor to have known of Perry's condition.

Considering the character of the client, the services admittedly performed, the wealth of the client, and the other factors mentioned above, we find nothing justifying censure or discipline for the fees charged by Herrscher in this period.

The second charge found sustained by the Board of Governors, and upon which it based its recommendation of disbarment, has to do with the $50,000 contract entered into in October of 1930 between Herrscher and Ehrlich on one side and Mrs. Perry on the other. It is worthy of mention that Ehrlich was a partner of Herrscher in this transaction, was named as one of the contracting parties, was present at and participated in the interview at which Mrs. Perry is supposed to have been practically forced into signing the contract, and received half the moneys paid under it. No charges were filed, however, against Ehrlich. If the securing of this contract, under the circumstances disclosed by the record, constituted an offense warranting discipline, it would seem clear to us that the rule announced by this court in Gray v. State Bar, 1 Cal. (2d) 226, 33 P.(2d) 1016, would be applicable. In that case, it was held that all parties involved in the transaction under question should be proceeded against.

Although we are of the opinion that the fee charged for the services performed and contemplated to be performed under this contract was very large, and probably excessive, we do not believe that the circumstances of the case are such as to bring it within the rules announced, supra, so as to warrant the discipline of the attorney or attorneys involved. Nor do we think that, weighing the evidence by the rules already announced, the inference contained in the argument in the State Bar's brief to the effect that the evidence shows that Herrscher took advantage of the ignorance of Mrs. Perry and practically forced her to sign the contract is justifiable.

The contract contemplated that the sum therein mentioned was to be payment in full for services rendered Perry prior to July 2, 1930 (the date upon which he was declared incompetent); for services rendered Mrs. Perry personally; and for the services rendered Mrs. Perry as guardian of the estate of her husband. When the contract was signed in October of 1930, Perry was out of the sanatorium and out of danger of immediate death. The contract contemplated services by Herrscher in the handling of the estate until Perry's death, or until his restoration to competency—an uncertain period.

The services rendered and to be rendered, for which the $50,000 was to be paid, are too numerous to set forth in full herein.

As already set forth, when Perry was on his way to Honolulu, the 1929 stock market crash occurred. Perry was considerably distressed. He and his wife left the yacht in Honolulu and immediately returned to San Francisco. At Mrs. Perry's request, Herrscher met them at the boat and, because of Perry's then condition, immediately had him placed under the care of a physician, a specialist in nervous disorders. Herrscher made all arrangements. Perry remained in the hospital for two weeks and was then discharged as completely recovered.

About this time, Perry's mistress was practically demanding that Perry choose between his wife and her. She had threatened to make a scene at the boat upon Perry's return from Honolulu but, upon Herrscher's promise to arrange an interview, agreed not to do so. Herrscher arranged a meeting between the three principals and so handled this delicate situation that Perry's mistress returned to the east, apparently satisfied and without further demand.

Herrscher sent an attorney from his office to Honolulu in connection with the yacht. When the troubles there were satisfactorily settled, he had the yacht returned to San Francisco. He then rented the boat for a short period at an attractive rental and ultimately handled the sale of the boat. For the estate of the incompetent, he settled numerous claims, some large, some small, at about 50 cents on the dollar. These services required considerable time and considerable correspondence.

The United States government was making a large claim (about $80,000) against the estate, on account of 1929 income tax, and claimed a lien on Perry's property. Herrscher got the yacht and the Pebble Beach property released from the lien. He tried to compromise the government's claim for a fraction of the amount claimed by it and informed Mrs. Perry that he believed it could be settled for about $5,000. By letter addressed to Mrs. Perry, it was agreed as part of the contract of October 14, 1930, that Herrscher and Ehrlich would pay Kanouse, an income tax expert, the sum of $2,640.12, out of their fees. It was also contemplated that Herrscher should take a trip to Washington, if necessary, at his own expense, in connection with the tax claim.

He spent considerable time and effort in attempting to exchange the Pebble Beach properties, which had cost Perry over $300,000, for income-bearing properties in San Francisco. He also drew a will for Mrs. Perry. The board expressly finds that in performing these and numerous other matters on behalf of Mrs. Perry, as guardian, that "there is no question but that a great deal of respondent's time and attention was required and given. The services so rendered were performed in a capable manner."

As already stated, it is the theory of the State Bar that the evidence indicates, not only that the fee was largely excessive, but also that Herrscher took advantage of Mrs. Perry's supposed lack of business experience, and practically forced her to sign the contract. The uncontradicted documentary evidence refutes this theory. Herrscher first wrote to Mrs. Perry concerning the fee on October 6, 1930, stating that he believed the fee should be determined before she left for New York and briefly referring to the services rendered and to be rendered. The letter indicates that prior conversations had been had on this subject. Mrs. Perry called upon Herrscher and, on October 7th, he wrote her a letter, setting forth substantially the terms of the contract as later signed by the parties. On the same date, Herrscher gave Mrs. Perry a letter enumerating the services that had been rendered. A conference was had between Herrscher and Mrs. Perry on October 8th, and another on October 9th. Mrs. Perry then suggested that the fee be reduced to $40,000. To this suggestion, Herrscher and Ehrlich refused to accede. Mrs. Perry then suggested that certain matters mentioned in the contract be deleted and certain other provisions changed. She suggested that the interest rate be lowered from 6 per cent. to 4 per cent.; that the maturity of the note be extended; that interest should not start to run until January, 1931. Herrscher consented to all of these changes. It is quite apparent from Mrs. Perry's testimony, and from the documentary evidence, that Mrs. Perry knew what she was doing and had a pretty good idea of business affairs. Mrs. Perry apparently had the completed contract in her possession from October 9th until it was signed on October 14th. No attempt was made to rush Mrs. Perry into signing the contract. She could, if desired, have secured independent advice. She testified that she went to Herrscher's office on October 14th, after having told him that she would call that day and sign the contract, with the intent of telling him that she desired more time to consider the contract, but she also testified that she did not communicate this desire to Herrscher. The finding of the Board of Governors to the contrary is totally unsupported. She did testify that she signed because Mr. Perry walked into the room and that this so disturbed her that she would have signed anything rather than excite him. As we read the record, there is no evidence to indicate, directly or indirectly, that any pressure was brought to bear upon her in signing the contract. It is true that Herrscher had her pay him $18,000 from the estate without first securing an order of court, but the contract expressly provided that it would be submitted to the court and, in fact, when Herrscher prepared the proposed guardian's report, he attached thereto the contract, as an exhibit. He was, of course, able at all times to repay this sum, if the court should disapprove the contract.

These facts have been held to be of some weight in determining culpability. Peck v. State Bar, 217 Cal. 47, 17 P.(2d) 112.

After the contract was signed, Mr. and Mrs. Perry went to New York. In December, 1930, Herrscher submitted to Mrs. Perry a proposed guardian's report, setting forth in detail the services rendered and, as stated above, attaching thereto a copy of the contract. Mrs. Perry refused to sign, because the report was too voluminous and on the ground that the report displayed too much ego on Herrscher's part. It is significant that several months after returning to New York and after Mrs. Perry had had the opportunity to consult with friends and advisers in New York, she did not object at all to the terms of the contract. There was considerable correspondence between Herrscher and Mrs. Perry after she returned to New York, and it is also significant that this correspondence indicates a very friendly feeling on Mrs. Perry's part toward Herrscher. There is no indication that she felt that she had been defrauded or forced into the contract.

The State Bar contends that the evidence also shows that Perry's estate was insolvent when the agreement was entered into. Much is made of a letter written by Perry to the internal revenue department in connection with the attempted compromise of the tax claim, in which Herrscher sets forth the assets of the incompetent at $102,000 and his liabilities (including the $32,000 note held by him and Ehrlich) at $150,000. A reading of the letter indicates that it was a bargainer's statement as to assets, written in the hope of forcing the government to accept a compromise. The largest part of the listed liabilities consisted of the $80,000 claim of the government and the $32,000 note. The letter lists the Pebble Beach properties, costing over $300,000, as valueless, although the mortgage thereon was for but $125,000. The record also shows other assets not listed.

We repeat that, although the contract provided for a large fee, and probably an exorbitant one, and although, in a civil action, it probably could not be sustained, we do not believe that this alone warrants discipline. The other elements required to warrant conviction in this quasi-criminal proceeding are not present.

The last charge made against Herrscher has to do with the so-called furniture transaction. The Board of Governors found that Herrscher made a secret profit of about $4,000 at Perry's expense on this deal. This is the most serious charge preferred against Herrscher.

Herrscher was president of the Kaeleku Sugar Company, which corporation operated a large sugar plantation in the Hawaiian Islands. This company purchased all supplies through Herrscher, who was designated as factor for the company. As such factor, Herrscher was privileged to purchase furniture on the San Francisco Furniture Exchange at wholesale rates. Miss E. R. Johnson was employed by Herrscher as secretary and she was also secretary of the sugar company. She apparently was a highly trusted employee, having authority to sign and cash checks, and being in complete charge of the records and books of the office, and of Herrscher's personal books. The evidence shows that Herrscher seldom examined the books. Among her other duties, she did most of the purchasing of supplies, in Herrscher's name, for the sugar company. These purchases were very large, totaling in some years as much as $150,000.

Some time in April of 1929, Perry desired to purchase furniture for his home at Pebble Beach, for his San Francisco apartment, and for his yacht. He discussed the matter with Herrscher. The latter informed Perry that Miss Johnson could probably secure the furniture for him, but that she would have to handle the transaction. The record is clear and Perry's own testimony shows that Miss Johnson alone handled the transaction. There is a dispute as to whether Miss Johnson told Perry that she would get him furniture at wholesale, or at a 25 per cent. discount. The correspondence between them indicates that she promised him a 25 per cent. discount. Perry testified that she promised him the furniture wholesale. Miss Johnson purchased for Perry, devoting considerable time to the transaction, furniture of the retail value of $9,226.84. This furniture actually cost about $5,000. Miss Johnson paid for the furniture by checks drawn and signed by her on the sugar company account. She billed Perry for the furniture for $9,226.84, less 25 per cent. Perry neglected to pay the bill. Miss Johnson then informed Perry by letter that unless he paid the bill by a definite date the 25 per cent. discount would be lost. She did not tell him that she had, in fact, already paid the bill. Perry failed to pay the bill by the date mentioned, whereupon Miss Johnson billed him for the full retail price. Perry ultimately sent to Miss Johnson a check drawn to the order of Herrscher for the full retail price and inclosed with the check a letter to Miss Johnson, in which he stated that: "I don't believe Mr. Herrscher ever authorized the squandering of $2500 (referring to the 25 per cent discount) just because conditions were such I could not promptly meet the bill." This and other evidence clearly indicates that at least up to this point Miss Johnson alone handled this transaction and that Perry knew that Herrscher knew nothing about the details.

When the check for $9,226.84 arrived at the office, Miss Johnson asked Herrscher to indorse it. He asked her what it was for and she told him that it was in full for furniture purchased for Perry. Herrscher suggested that she type that information above the indorsement and that was done. Miss Johnson and Herrscher testified that she did not tell Herrscher of the details of the transaction, and this testimony is corroborated by her subsequent actions. Miss Johnson then took the check to the bank and cashed it. She then deposited $5,000 of the cash in the sugar company account, to refund that account the sum used by her to buy the furniture. She then took about $1,500 and deposited it in one of Herrscher's accounts and kept the balance of about $2,500 in cash in the safe in an envelope, with her name on it. Apparently it was her view then that she had earned this $2,500 (about the amount of the 25 per cent. discount) and that she was going to keep it. She testified that she subsequently withdrew from Herrscher's account the $1,500 deposited therein and used the same for her own purposes. She further testified that she covered up these transactions by the entry of fictitious items. She identified the checks by which this $1,500 was supposed to have been withdrawn.

It is perfectly clear that some one made a secret profit on this deal. The question is, did Herrscher know about it and did he knowingly participate therein?

Herrscher testified that he was entirely ignorant of this secret profit until March or April of 1931, when, during the negotiations with Finn, the matter came to light. Both Webb and Attorney Hayes, office associate of Herrscher, testified as to the latter's complete amazement and anger when he discovered the true facts. There is not one bit of evidence that indicates that Herrscher knew of this deal until this time. All the direct evidence is the other way. The finding of the Board of Governors to the effect that Herrscher knew of and participated in this secret profit is based on inference alone. We do not feel justified in disbarring an attorney on such inferences, when the direct evidence and the surrounding circumstances bear out his version of the transaction.

At the hearing, Miss Johnson made a most unconvincing witness. If the correctness of her story were based on her testimony alone, we should be inclined to hold with the board that her story is not entitled to belief. She attempted to assume full responsibility for the defrauding of Perry. She at first refused to disclose what she had done with the money and told many different and inconsistent stories, until finally, at the determined insistence of Herrscher's attorneys, she disclosed that several months after she had cashed the $9,000 check, she used over $2,500 of the money to repay certain embezzlements of a relative. The relative was produced and he told his story to the examiner, and the examiner expressed himself as satisfied. The company for which the embezzling relative worked and from whom he had stolen the money corroborated the story.

The witness, Miss Johnson, also made an unfavorable impression in that, on her cross-examination, it developed that while Herrscher was in Europe and while the grand jury had Perry's charges under consideration, she paid out $10,000 of Herrscher's money for the purpose of bribing the grand jury. The money was not so used, the instigator of the plan pocketing the major portion of the money. The examiner for the State Bar frankly admitted and, in fact, stipulated that Herrscher knew nothing of this deal and had nothing to do with it. When Herrscher returned, he retained counsel and forced the instigator of this plan to disgorge a portion of this money so received.

[8] After a careful reading of the record herein, we are of the opinion that the findings of the Board of Governors are not supported by the weight of the evidence. It therefore follows that the proceedings against petitioner should be dismissed.

It is so ordered.

* * *

9 Cal.App.2d 345

PEOPLE v. BEAL.

Cr. 186.

District Court of Appeal, Fourth District, California.

Oct. 4, 1935.

1. Criminal law 🔑274

Defendant who pleaded guilty to committing lewd or lascivious acts upon body of girl under age fourteen would not thereafter be allowed to withdraw plea on ground that defendant's mind was so confused at time of pleading, as result of intoxication, as to constitute overreaching of his free will and judgment, where defendant had two days to recover from intoxication, was carefully informed of his rights, was told that guilty plea would necessitate sending him to penitentiary, and was able to give clear-cut answers to questions and to describe what had occurred in manner which indicated he knew what he was doing (Pen. Code, § 288, as amended by St. 1933, p. 1028).

2. Criminal law 🔑274

Defendant who pleaded guilty to committing lewd or lascivious acts upon body of girl under age fourteen would not thereafter be allowed to withdraw plea on ground that defendant committed offense with different girl than girl named in complaint, where girl with whom defendant was found was girl with whom he had committed offense, notwithstanding that he may have been confused as to girl's name (Pen. Code, § 288, as amended by St. 1933, p. 1028).

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Mace Beal was convicted of committing lewd or lascivious acts upon the body of a girl under the age of fourteen years. From an order refusing to permit the defendant to withdraw his plea of guilty and enter a plea of not guilty, the defendant appeals.

Order affirmed.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

This is an appeal from an order refusing to permit the defendant to withdraw his plea of guilty and enter a plea of not guilty.

The defendant was accused of a violation of section 288 of the Penal Code, as amended by St. 1933, p. 1028, alleged to have been committed in a particular manner upon the person of Kathaleen McAnanlly, a child of the age of nine years, on the 11th day of July, 1935. The defendant was arrested on the evening of that day and confessed his guilt to the arresting officers. A complaint was filed on July 12, 1935, and on the next day he was taken before a justice of the peace. After reading the complaint to him, the justice informed him of his rights, telling him he was entitled to a speedy examination, to a reasonable delay, to counsel at all stages, to process to compel the attendance of any witnesses that he might desire, to be confronted by witnesses against him and to cross-examine them, and to be admitted to bail. He was then warned that any statement he made might be used against him and told that an officer would take a message from him to any one in the township free of charge, and bail was fixed. The justice then asked him when he wanted to have his preliminary examination to which he replied: "Just as quick as I can get them." He was then asked if he desired to be sworn and testify at that time, and he said that he did. After being sworn, he stated that he had taken the little girl with him on a hunting expedition on the 11th and then told what had occurred, giving facts which abundantly proved a violation of the Code section in question.

Later on that day the defendant was taken into the superior court, where he was duly arraigned and informed of his rights. He stated that he desired an attorney and the court appointed one to represent him. Immediately thereafter the defendant stated to the court that if the charge against him was not for rape, he desired to enter a plea of guilty to the charge without further delay and without the appointment of an attorney. The judge then said to him: "Even though you are not charged with rape you are still charged with a felony and if you enter a plea of guilty it will be necessary for this court to send you to the state's prison at San Quentin." The defendant then stated that he desired to proceed, and thereupon entered a plea of guilty to the crime as charged. The court then proceeded to examine the defendant and to pronounce sentence. In the course of the examination the defendant admitted having performed the acts constituting the basis of the charge.

On July 16, 1935, counsel for the defendant filed a petition, sworn to by the defendant, asking permission to withdraw his plea of guilty and substitute a plea of not guilty. In this petition the defendant alleged that on July 11, 1935, he was arrested while in an automobile with a child under the age of fourteen years; that at the time of his arrest he was so far under the influence of intoxicating liquor as to be unable to operate the automobile; that shortly after the arrest and while he was still under the influence of liquor and unable to understand or know what he was doing the officer induced him to sign some sort of statement or confession; that at the time of signing the same he did not know or understand the contents thereof; that while he was depressed and recovering from the effects of the liquor a deputy sheriff told him that if he would plead guilty to the charge it would be better for him and that he would be sentenced to three months in the county jail; that while he did not fully understand or appreciate the nature of the charge he did understand that it was based upon alleged immoral relations with the said minor child and he was grieved and depressed that such charges should be made against him; that he had no opportunity to consult with friends or counsel up to the time he entered his plea of guilty; that he relied upon the statement of the deputy sheriff that he would be given only a jail sentence and, relying thereon and still suffering from the depressing influence of intoxication, he testified at the preliminary examination; that at no time did he realize the seriousness of the charges against him; that when he was not drunk the fact that such a charge was made made him utterly disgusted; that at no time was he "able to rationally determine his course of conduct"; that he is not guilty of lewd and lascivious conduct with or upon the person of said child; and that he desires to change his plea of guilty to that of not guilty. The judge of the trial court filed an affidavit setting forth what occurred prior to the passing of sentence on July 13. The request for permission to change his plea was denied, and from that order this appeal was taken.

The appellant relies upon such cases as People v. Schwarz, 201 Cal. 309, 257 P. 71, in which it has been held that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits the court may, on a proper showing, grant him the privilege of withdrawing his plea of guilty and entering one of not guilty. It is argued that the record here shows that the appellant's mind was confused, that he was still suffering from the effects of his debauch of the second day before, that he was given no opportunity to exercise deliberation, that he was without the assistance of counsel, that he had no real knowledge of the charge against him, that he was materially mistaken as to the seriousness of the punishment which he faced, and while it is expressly stated that no charge of fraud is brought against any one, it is argued that these things constituted an "overreaching" of the free will and judgment of the appellant.

[1] The appellant had two days to recover from his intoxication, he was fully and carefully informed of his rights by the justice of the peace, and the record of the preliminary examination, which is before us, does not support his claim that he was so confused that he did not understand what was going on. He made clear-cut answers to all questions except those relating to the name of the child and described what had occurred in a way that indicates that he thoroughly understood what he was doing. This is also indicated by his actions when taken into the superior court later the same day. Even after an attorney had been appointed for him, he expressed the desire to plead guilty without delay and without an attorney, since the charge was not rape. After the court had warned him that the charge was a felony and that a plea of guilty would result in his being sent to the penitentiary, he stated that he desired to proceed, and

entered a plea of guilty. If a sheriff told him that a plea of guilty would result in a jail sentence, he knew before he pleaded guilty that he could not rely on such a statement, as the court informed him that if he did so he would be sent to the penitentiary. In our opinion, there is nothing to show any overreaching of the free will and judgment of the defendant within the meaning of the cases cited, and nothing to show an abuse of the discretion vested in the trial court.

It is further urged that it affirmatively appears from the record that the appellant was not guilty of the crime with which he was charged. It is argued that appellant's testimony at the preliminary examination shows that he committed the forbidden acts with a different girl than the one named in the complaint and that he committed the offense in a manner slightly different from that alleged. This argument seems to be made here for the first time, and no such claim is included in appellant's sworn petition for permission to change his plea. The contention that the offense was committed in a manner other than that named in the complaint may be dismissed with the statement that the appellant's testimony at the preliminary examination, while it could be taken either way, fully justifies the inference that the offense was committed in the manner charged.

[2] The main contention here is that the appellant's testimony at the preliminary examination shows that he knew Kathaleen McAnanlly, but that he had had nothing to do with her, and that his testimony related to his conduct with some other girl. Immediately after the justice of the peace read to the appellant the complaint charging him with misconduct upon the person of Kathaleen McAnanlly, the justice said: "Mr. Beal you may proceed and testify as you desire to the charges as I have read them to you here," to which the appellant replied, "I was drunk and played with her." During the examination he was asked if he "knew this girl Kathaleen McAnanlly before this happened," and replied, "Yes." Later he said he was not talking about Kathaleen McAnanlly, that "I never said anything to Kathaleen McAnanlly," and that he did not know the name of the girl about whom he was talking. He then stated that he was out hunting "day before yesterday," that he had a girl with him, that he did not know her name, and that "she was about fourteen or eighteen years old," whereupon the district attorney asked "Mildred Joseph's daughter—I understand you don't know what the little girl's name is now?" He replied, "No, I don't."

While the appellant may have been confused as to which girl was Kathaleen McAnanlly, there can be no question as to which girl he was found with, and we think it sufficiently appears from the record that in his testimony at the preliminary examination he was talking about the same girl he mentions in his petition for change of plea, that this was the girl with whom he was found, and that the only confusion arose from the fact that the girl's mother had a different name and that the appellant did not know what the girl's name then was. The appellant refers in his petition for permission to change his plea to the child found with him at the time he was arrested and stated that he understood that the charge was based upon his alleged relations with said child, he described at his preliminary examination how he had taken the girl with him on a hunting trip, giving this testimony when asked to proceed and tell what had occurred after hearing the complaint read, he pleaded guilty to the charge in the superior court and according to the trial judge, when later examined, he admitted having performed the acts charged in the complaint. There could be no real question as to the identity of the child found with him, and had such a claim been raised in the trial court, any doubt as to the name of the child could have been cleared up. We entertain no doubt of the appellant's guilt or of the fact that the entire proceedings, including the admissions made by the appellant, related to the girl who was found with him at the time he was arrested.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

STULTZ v. BENSON LUMBER CO. et al.*

Civ. 1184.

District Court of Appeal, Fourth District, California.

Sept. 24, 1935.

Hearing Granted by Supreme Court Nov. 22, 1935.

1. Appeal and error ⚷917(1)

All properly pleaded allegations of complaint must be accepted as true on appeal from judgment sustaining demurrer to complaint without leave to amend.

2. Negligence ⚷27

Where manufacturer or vendor sells to another an article not inherently dangerous in itself, but because of known structural or other such weakness will be inherently dangerous to those using it for purpose for which it was manufactured or sold, such weakness and such purpose being known to manufacturer or vendor, or both, at time of sale, manufacturer or vendor will be held liable to employee of vendee who is injured while using article, in course of his employment for purpose, for which it was manufactured or sold, in absence of contributory negligence.

3. Negligence ⚷27

Duty of vendor to warn of defects in article sold which make it dangerous for contemplated use is ordinarily fulfilled when first purchaser is warned and given all knowledge vendor possesses on subject.

4. Negligence ⚷27

Vendor of article may be required to go further than to warn first purchaser of defects in article which make it dangerous for contemplated use where vendor has reason to suspect that such information will fail to reach those who are to use chattel, or, if he fails to do so, to take risk of being subjected to liability if such information is not brought home to those whom vendor should expect to use article.

5. Negligence ⚷136(18)

In action against vendor of defective plank for injuries received by buyers' employee when plank, which had been used in construction of scaffold, broke, whether acceptance of defective plank by employers for use in scaffold with knowledge of such defects should have warned vendor that employers were so careless that further warning should have been given by vendor to protect itself against claims for damages by those injured while using scaffold *held* question for jury.

6. Negligence ⚷136(25)

In action against vendor of defective plank, which was used in construction of scaffold, for injuries received by buyers' employee when plank broke, whether negligence, if any, of vendor in failing to give sufficient warning of defects in plank was proximate cause of employee's injuries, where employers were negligent in use of such plank with knowledge of defect, *held* for jury.

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Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clyde A. Stultz against the Benson Lumber Company, Horace Raymond Newby, and Charles D. Newby. Judgment for defendants, and plaintiff appeals.

Judgment affirmed as to defendants Horace R. Newby and Charles D. Newby, and reversed and remanded, with directions, as to defendant Benson Lumber Company.

Edward J. Kelly, Marie M. Herney, and Ben B. Rubin, all of San Diego, for appellant.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of the defendants, entered after the sustaining of a demurrer to a second amended complaint without leave to amend. The appeal is from the judgment in its entirety. Plaintiff admits that the portion of the judgment in favor of Horace Raymond Newby and Charles D. Newby must be affirmed, leaving under attack here only that portion of the judgment in favor of the Benson Lumber Company, a corporation. We will hereafter refer to the Benson Lumber Company as the defendant.

[1] Our sole problem is to determine the sufficiency of the allegations of the second amended complaint to state a cause of action against defendant. Of course, on this appeal we must accept as true all properly pleaded allegations of the complaint.

An examination of this pleading discloses that the following facts are alleged: That on April 26, 1934, plaintiff was in the employ of the Newbys and was painting a building on North Island in San Diego county; that he was standing on a scaffold which placed him about 25 feet above the ground; that the scaffold had been constructed by the Newbys; that while plaintiff was standing upon the scaffold and engaged in his painting, a plank, constituting a main support, broke, precip-

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*For subsequent opinion see 59 P.2d 100.

itating him to the ground causing serious injuries; that the plank had been cut, sawed, and shaped from the original timber by defendant; that the Newbys purchased this plank from defendant and at the time of purchase they informed the agents of defendant that it was to be used as a main support of the scaffold; that the plank was filled with knots, was cross-grained, and otherwise inappropriate for the purpose for which it was sold and used; that at the time of the sale and use of the plank it was inherently and imminently dangerous when used as a main support of the scaffold because of its alleged defects; that these facts were all known by defendant and the Newbys at the times of the sale and use of the plank. The other allegations of the second amended complaint are not material on this appeal. It is evident this is a tort action.

Plaintiff asks us to sustain three propositions, and contends that if we do, we must reverse the judgment. They are as follows:

1. "That lumber is a manufactured article, and that the Benson Lumber Company, a corporation, was a manufacturer, and as such made and sold the defective plank."

2. "That in addition to being a manufacturer of the defective plank, the Benson Lumber Company, a corporation, was the vendor thereof."

3. "That a manufacturer and vendor who produces an article which may be dangerous to life and limb according to its use, and is fully aware of the dangerous use to which the article is to be put, whether that knowledge is acquired by inference from known facts that the article is ordinarily so used, or acquired from an express declaration of the purchasers that it is to be used for such dangerous purpose, is liable for damages to a stranger to the purchase, who uses such manufactured product for the purpose for which it was sold and intended to be used as stated by the purchaser, and which injuries are proximately caused by defects of which the vendor and manufacturer was aware or should have been aware."

Before approaching the problems presented by these propositions, a few general observations on the history, growth, and present condition of the law on the subject might be helpful. In the early cases the manufacturer of inherently dangerous commodities, such as poisons, explosives, and things of a like nature which in their normal operations put human life in danger, was required to exercise care and skill in the manufacture and correctness in labeling. Generally speaking, the manufacturer was held to be liable to those coming within his orbit of duty who were injured as a proximate result of lack of skill or care in the manufacture or false labeling. In the case of other articles not inherently dangerous in themselves, when used for some purposes, but possessing such dangers when used for other purposes, the doctrine grew by extending the liability to those in privity of contract with the manufacturer or vendor who had notice and knowledge, express or implied, of such dangerous defects and dangerous use. In some jurisdictions the rules were broadened by exceptions grafted onto them by the courts, so that the manufacturer or vendor of an article, safe in itself and only dangerous when put to a particular known use, is made liable for injury to the person lawfully using it or lawfully upon the premises where it is found when the injury is proximately caused by the known defect in manufacture or known negligent structural weakness, when measured by the known purpose of use. In these jurisdictions the orbit of duty of the manufacturer or vendor has been extended far beyond that contemplated in the early rules to which the courts of many states still adhere. This has resulted in such a hopeless confusion in judicial decisions and conflict in authority that it is impossible to even make an attempt to harmonize them. It cannot be done. This conflict exists in the decisions of the same courts of individual states, and is found to a lesser degree in California, though by recent cases the limits of the rules and exceptions seem to be well defined.

In those jurisdictions, where the early rule has been hesitatingly broadened by the adoption of exceptions to it, the courts seem to be actuated by the thought that the manufacturer or vendor of an inherently dangerous article, or an article that may become inherently dangerous when put to a particular known use, should respond in damages for the injury of any person, proximately caused by the use of such article when its use by such person should have been anticipated by the manufacturer or vendor. This more humanitarian rule finds warm support and equally strong condemnation in the courts of various jurisdictions.

An interesting illustration of the rapid growth of this broadening process is found in the opinions in Cadillac Motor Car Co. v. Johnson, 221 F. 801, L. R. A. 1915E, 287, Ann. Cas. 1917E, 581, and Johnson v. Cadillac Motor Car Co., 261 F. 878, 8 A. L. R. 1023, both rendered by the United States Circuit Court of Appeals of the Second Circuit, the first in March, 1915, and the second in November, 1919. These two decisions were rendered by the same court, in the same action between the same parties, and on similar proven facts. The plaintiff purchased from a dealer an automobile manufactured by defendant and sold by it to the dealer. It had a defective wheel which collapsed during careful use, causing serious injury to plaintiff. A judgment in his favor was reversed by the first decision because there was no privity of contract between the plaintiff, the purchaser from the dealer, and the defendant, the manufacturer, and original vendor. In the second decision the court repudiated the privity of contract theory and reversed the judgment of the trial court in favor of defendant, which judgment was entered in strict compliance with the rule announced in the first opinion, that privity of contract between the injured party and the manufacturer or vendor must exist before judgment for plaintiff could be rendered. By citing the second decision, we do not intend to intimate that what is there said concerning the law of the case can be made applicable to cases pending in California.

Counsel for both parties have been prolific in the citation of authorities from all over the United States with an occasional excursion into English jurisprudence. No good could come from a discussion of any great number of these cases. Many of them are flatly conflicting and can neither be harmonized nor distinguished. We will confine ourselves to the citation of their authorities under the points made without criticism, approval, or consideration, except the relatively few that we consider helpful in discovering the correct rules to be applied to this case in California.

Plaintiff cites many cases in support of his first proposition. It is not necessary to cite them in view of the concession of the defendant that it is immaterial what conclusion is reached on the question of whether the cutting, sawing, and shaping of the plank from the original timber by defendant made it the manufacturer, and the further concession that we may consider defendant such manufacturer. It is alleged that defendant was the vendor of the plank, and we must accept this as true. We will therefore assume that defendant was the manufacturer and vendor of the plank, and that it had notice of its structural weakness and the consequent danger to any one using the scaffold of which this plank formed a main support. This last is alleged and must be accepted as true. It is also alleged, and must be accepted as true, that the defendants Newby had notice of the same defects and danger at the time they purchased the plank and when they used it as a main support of the scaffold.

In support of his third contention, plaintiff cites, among others, the following cases: Lewis v. Terry, 111 Cal. 39, 43 P. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 55 P. 706; Dahms v. General Elevator Co., 214 Cal. 733, 7 P.(2d) 1013; Hall v. Barber Door Co., 218 Cal. 412, 23 P.(2d) 279; Kalash v. Los Angeles Ladder Co., 1 Cal. (2d) 229, 34 P.(2d) 481; Cliff v. California Spray Chemical Co., 83 Cal. App. 424, 257 P. 99; Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609, 269 P. 975; MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, 1051, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440; White Sewing Machine Co. v. Feisel, 28 Ohio App. 152, 162 N. E. 633, 634; Heckel v. Ford Motor Co., 101 N. J. Law, 385, 128 A. 242, 39 A. L. R. 989; Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N. W. 855, 60 A. L. R. 357; McLawson v. Paragon Refining Co., 198 Mich. 222, 164 N. W. 668; Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894; Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20, 24; Standard Oil Co. v. Parrish (C. C. A.) 145 F. 829; and Gerkin v. Brown & Schler Co., 177 Mich. 45, 143 N. W. 48, 48 L. R. A. (N. S.) 224.

Defendant cites the following cases, among others, as supporting the rule that the thing manufactured must be in itself inherently dangerous, or there must be privity of contract between plaintiff and defendant before recovery can be had: Catlin v. Union Oil Co., 31 Cal. App. 597, 161 P. 29; Fidelity, etc., Co. v. Paraffine Paint Co., 188 Cal. 184, 204 P. 1076; Huset v. J. I. Case, etc., Co. (C. C. A.) 120 F. 865, 61 L. R. A. 303; Stamford, etc., Co. v. Starkey (Tex. Civ. App.) 26 S.W. (2d) 368; Windram Mfg. Co. v. Boston

Blacking Co., 239 Mass. 123, 131 N. E. 454, 17 A. L. R. 669; Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 A. 314, 19 L. R. A. (N. S.) 923. Some of these cases, as well as others cited by defendant, are based upon the implied warranty imposed by uniform sales acts. This being strictly a tort action, we are not concerned with implied warranties.

One of the widely cited cases which upholds the broader and more liberal view of the question we are considering is MacPherson v. Buick Motor Co., supra. The opinion was written by Mr. Justice Cardozo, now of the Supreme Court of the United States, while a member of the Court of Appeals of New York. It was there said: "The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully concealed it. The case, in other words, is not brought within the rule of Kuelling v. Roderick Lean Mfg. Co., 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124. The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser. * * * Early cases suggest a narrow construction of the rule. Later cases, however, evince a more liberal spirit. First in importance is Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311. The defendant, a contractor, built a scaffold for a painter. The painter's servants were injured. The contractor was held liable. He knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that very purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care.

"From Devlin v. Smith we pass over intermediate cases and turn to the latest case in this court in which Thomas v. Winchester [6 N. Y. 397, 57 Am. Dec. 455] was followed. That case is Statler v. George A. Ray Mfg. Co., 195 N. Y. 478, 480, 88 N. E. 1063. The defendant manufactured a large coffee urn. It was installed in a restaurant. When heated, the urn exploded and injured the plaintiff. We held that the manufacturer was liable. We said that the urn 'was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people if not carefully and properly constructed.'

"It may be that Devlin v. Smith and Statler v. George A. Ray Mfg. Co. have extended the rule of Thomas v. Winchester. If so, this court is committed to the extension. The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy. But whatever the rule in Thomas v. Winchester may once have been, it has no longer that restricted meaning. A scaffold (Devlin v. Smith, supra) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (Statler v. George A. Ray Mfg. Co., supra) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water. Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894. * * *

"We hold, then, that the principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow."

Another well-considered case which follows the same rule is White Sewing Machine Co. v. Feisel, supra, which involved damages for injury to the child of the purchaser of an electric sewing machine. The injury was caused by a defective electric cord. It was there said: "It is a general rule of law that a manufacturer or seller is not liable to third persons, with whom he has no contractual relations, for negligence in the manufacture or sale of an article. 24 R. C. L. 512, § 804, and cases cited. The general rule is grounded on the leading case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. R. 402. This case has been frequently followed in the United States. Huset v. J. I. Case Threshing Machine Co. (C. C. A.) 120 F. 865, 868 [61 L. R. A. 303]. To this rule, however, many courts have recognized that exceptions exist. [Citing cases.]

"The manufacturer of an appliance, which, if defective in construction, will become inherently or imminently dangerous when used for the purpose for which it was intended, owes a duty to the public, irrespective of contractual relations, and it has been held in many cases that he will be liable to third persons for an injury directly caused by negligence in failing to make reasonable inspection of such defective appliance, where the injury was sustained while the appliance was being used for the purpose intended, and where the danger might reasonably have been foreseen by the manufacturer. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633, 48 L. R. A. (N. S.) 213, and footnote at page 216, Ann. Cas. 1915C, 140; 13 A. L. R. 1183, and cases cited; 17 A. L. R. 683, and cases cited; 39 A. L. R. 993, and cases cited; 41 A. L. R. 35, and cases cited; 24 R. C. L., pp. 512 and 513.

"An examination of the cases cited will disclose that, while the rule was originally applied where the article of sale was 'inherently' or 'imminently' dangerous, it is now commonly invoked in cases where the dangerous character of the thing is made imminent by defective construction, which is the result of negligence, or would be discoverable upon exercise of ordinary care in making a reasonable inspection."

Two interesting cases involving falls by workmen employees, in the one from a structurally defective scaffold and in the other from a like constructed platform, are Huset v. J. I. Case Threshing Machine Co., supra, and Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524. These cases are valuable, not only for their clear reasoning, but for their extensive citation of authorities. They each took the view that privity of contract between the plaintiff and defendant was unnecessary in order to sustain the action. The federal case went up to the United States Circuit Court of Appeals after a demurrer to an amended complaint had been sustained in the trial court. It was there said: "The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. [Citing cases.] * * * But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule. * * * The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64, 67; Lewis v. Terry [111 Cal. 39], 43 P. 398 [31 L. R. A. 220, 52 Am. St. Rep. 146]." The court was of the opinion that the case fell within the third exception because the defective platform "would bend and collapse whenever anyone stepped upon it" and the amended complaint "portrays a negligence imminently dangerous to the lives and limbs of those who should use the machine, a machine imminently dangerous to the lives and limbs of all who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff.' "

In the case of Dahms v. General Elevator Co., 214 Cal. 733, 7 P.(2d) 1013, 1015, a problem was involved somewhat similar to the one we are considering. The Supreme Court there said: "It is a general rule that an independent contractor such as a manufacturer or vendor of an article is not liable for injuries sustained by reason of defects in articles unless there is a contractual relationship between him and the one injured. [Citing cases]. The leading case so holding is Winterbottom v. Wright (1842) 152 Eng. Report, 402, where it was held that one under contract to furnish a coach was not liable to the driver of the coach for defective construction, after the coach had been furnished and accepted. To this general rule, as above stated, there are certain exceptions, recognized generally by nearly all jurisdictions. However, the various jurisdictions are in hopeless conflict as to the applicability of any one exception to particular factual situations. See note in 41 A. L. R. 8. * * * There are numerous cases from nearly every jurisdiction which hold that an action sounding in negligence may be maintained by a stranger to a contract for the execution of a specific piece of work or the sale of a manufactured article, if the product of the stipulated work or the article sold was abnormally dangerous or noxious. [Citing cases.] In most of the early cases in which the right of action under this exception has been discussed the courts have proceeded upon the theory that the duty arising from dangerous quality exists only as respects things that are, in the stricter sense of the term, 'dangerous in themselves,' such as poisons, explosives, etc. The California cases have heretofore shown an inclination to so limit the rule, although not definitely so holding. See Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206, where it was held that sulphuric acid is not such a dangerous instrumentality that one handling it does so at his peril; Lewis v. Terry, 111 Cal. 39, 43 P. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; Solomon v. Red River Lumber Co., 56 Cal. App. 742, 206 P. 498; Fidelity, etc., Co. v. Paraffine Paint Co., supra; Catlin v. Union Oil Co., supra. In McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 55 P. 706, plaintiff was injured by virtue of a defective sling furnished by defendant, who was not the employer of plaintiff. The court denied recovery to plaintiff because negligence was not shown to exist, but clearly held that the defendant owed plaintiff a duty of due care. At page 43 of 123 Cal. 42, 55 P. 706, 707, it is stated: 'But the rule is too firmly settled to be open to successful attack, that, where one agrees to furnish to a contractor material or appliances which he is to use in the performance of his task, the principal is liable to the servants and agents of the contractor for injuries which may result to them from his negligence or inadequate performance of his contract in this regard. * * * The principle itself is settled beyond the possibility of successful controversy.' "

The recent case of Kalash v. Los Angeles Ladder Co., 1 Cal.(2d) 229, 34 P.(2d) 481, 482, is particularly valuable because of its factual similarity to the instant case. There the Los Angeles Ladder Company manufactured and sold, to the employer of plaintiff, a forty-foot extension ladder with the next to the top rung defective. While the plaintiff was standing on this rung it collapsed, precipitating him to the sidewalk. The Supreme Court there said: "We are aware that a ladder is a rather simple tool and that no contractual privity existed between plaintiff and defendant. We further realize that the common law, as a general rule, throws a strong arm of protection around the manufacturer, warding off claims of third persons, not direct purchasers, for personal injuries sustained from use of articles so manufactured and sold by him. But we are at the same time in full sympathy with the acknowledged exceptions to this general rule and also with the trend of judicial decisions which extend these exceptions to include additional classes of cases not heretofore included. The language of Mr. Justice Cardozo while a member of the New York Court of Appeals, in the case of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, 1053, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, seems appropriate:

" 'We hold, then, that the principle of Thomas v. Winchester (6 N. Y. 397, 57 Am. Dec. 455) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. * * * In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.'

"The same learned justice, in his work entitled 'The Growth of the Law,' comments further upon this subject as follows (The Growth of the Law, 1924 Ed., p. 77): 'The development is merely a phase of the assault now extending along the entire line, upon the ancient citadel of privity. In New York, there is a remedy in tort regardless of privity, against the negligent manufacturer, where the subject of the manufacture is likely to be dangerous to life. MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440. The things classified as dangerous have been steadily extended with a corresponding extension of the application of the remedy. They began with Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, and the sale of poisons. They have been widened until they include a scaffold (Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311) or an automobile (MacPherson v. Buick Motor Co., supra), or even pies or cakes when nails and other foreign substances have supplied ingredients not mentioned in the recipes of cook books.'

"This same tendency in England is noted in a recent decision by the House of Lords, styled Donoghue v. Stevenson (1932) A. C. 562, where the subject received extensive consideration and the doctrine announced by Mr. Justice Cardozo was approved. This court has marched in complete step with these advancing judicial pronouncements. * * * Sufficeth it to say that from the principles stated we easily conclude that it was a proper question of fact for the jury as to whether or not an extension ladder of recent manufacture, when used as plaintiff was using it, became, because of defective construction or assembling, an instrument imminently dangerous to human life or limb."

[2] We conclude that the general rule in California, applicable to this case, now is, that when a manufacturer or vendor sells to another an article not inherently dangerous in itself, but because of known structural or other such weakness will be inherently dangerous to those using it for the purpose for which it was manufactured or sold, such weakness and such purpose being known to the manufacturer or vendor or both at the time of sale, the manufacturer or vendor will be held liable to respond in damages to the employee of the vendee who is injured while using the article, in the course of his employment, for the purpose for which it was manufactured or sold; provided the right of action be not defeated by the contributory negligence of the employee or upon some other legitimate ground.

Defendant urges that, assuming the rule we have announced is correct in California, still it cannot be liable because it is alleged in the second amended complaint that the defendants Newby, at the time they purchased the plank, had full knowledge of the defects in it, its lack of suitability for the purpose for which it was to be used, and the inherent danger in the scaffold if it were used as a main support for that structure. The argument in support of this proposition is divided into two phases: (1) Where the manufacturer or vendor of an article knows of a defect that will render it dangerous or unsafe for the purpose for which it is manufactured or sold, such manufacturer or vendor owes a duty to the purchaser, and to no other, to notify him of such defect and warn him of the danger. If this is done he performs the only duty which the law places upon the manufacturer or vendor, namely, to warn the purchaser; that as there is no duty to third persons there can be no breach of duty and consequently no negligence as to them. (2) Where the purchaser, with full knowledge of the defects and danger, persists in using the article, the act of the manufacturer or vendor, in making or selling it, ceases to be the proximate cause of the injury as its negligent use by the vendee becomes the proximate cause. The first contention resolves itself into the questions of whether the protection of the employee of the vendee from the danger comes within the orbit of duty of the manufacturer or vendor, and whether, as to him, his injury should be foreseeable by the manufacturer or vendor at the time of the sale. The second contention resolves itself into the question of whether the negligence of the purchaser, with full knowledge of the facts, in using the dangerous article is a new and independent act of negligence that breaks the line of causation from the negligence of the manufacturer or vendor to the injury of the employee, or whether the negligence of each of such parties is concurrent so that all of them should be liable to the injured employee.

In support of these contentions, defendant cites, among others, the following authorities: McCaffrey v. Mossberg & Granville Mfg. Co., 23 R. I. 381, 50 A. 651, 55 L. R. A. 822, 91 Am. St. Rep. 637; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Heindirk v. Louisville Elevator Co., 122 Ky. 675, 92 S. W. 608, 5 L. R. A. (N. S.) 1103; Foster v. Ford Motor Co., 139 Wash. 341, 246 P. 945, 48 A. L. R. 934; Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N. E. 1; Kilcrease v. Galtney Motor Co., 149 Miss. 703, 115 So. 193; Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N. E. 482; and Jazek v. Firuski (Sup.) 166 N. Y. S. 444. A majority of these cases come from jurisdictions where, or they were decided when, the privity of contract rule which we have already discussed was in force and the conclusions grew out of the reasoning under that rule. For that reason they are not of compelling force in jurisdictions not now following such rule.

The latest text on the questions involved in this case which we have been able to find is Restatement of the Law of Torts, pages 1038 to 1091, inclusive, and chapter sixteen commencing at page 1154, where all of the questions here involved are discussed.

[3] On the question of the duty of a vendor to warn of defects in the article sold which make it dangerous for a contemplated use, the authors state the general law to be that this duty is ordinarily fulfilled when the first purchaser is warned and given all the knowledge the vendor possesses on the subject. However, several exceptions to this general rule are given. One particularly applicable here is stated as follows (p. 1049, et seq.): "Chattels are often supplied for the use of others, although the chattels or the permission to use them are not given directly to those for whose use they are supplied, as when a contractor furnishes the scaffolding or other appliances which his sub-contractor and the latter's servants are to use, * * * In all such cases the question may arise as to whether the person supplying the chattel is exercising that reasonable care, which he owes to those who are to use it, by informing the third person through whom the chattel is supplied of its actual character.

[4] "The giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it. All sorts of chattels may be supplied for the use of others, through all sorts of third persons and under an infinite variety of circumstances. This being so, it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel or of the precautions which must be exercised in using it in order to make its use safe. There are, however, certain factors which are important in determining this question. There is necessarily some chance that information given to the third person will not be communicated by him to those who are to use the chattel. This chance varies with the circumstances existing at the time the chattel is turned over to the third person, or permission is given to him to allow others to use it. These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. Modern life would be intolerable unless one were permitted to rely to a certain extent upon others doing what they normally do, particularly if it is their duty to do so. * * * If, however, the third person is known to be careless or inconsiderate or if the purpose for which the chattel is to be used is to his advantage and knowledge of the true character of the chattel is likely to prevent its being used and so to deprive him of this advantage—as when goods so defective as to be unsalable are sold by a wholesaler to a retailer—the supplier of the chattel has reason to expect, or at least suspect, that the information will fail to reach those who are to use the chattel and whose safety depends upon their knowledge of its true character. In such a case, the

supplier may well be required to go further than to tell such a third person of the dangerous character of the article, or, if he fails to do so, to take the risk of being subjected to liability if the information is not brought home to those whom the supplier should expect to use the chattel. * * * Even though the supplier has no practicable opportunity to give this information directly and in person to those who are to use the chattel or share in its use, it is not unreasonable to require him to make good any harm which is caused by his using so unreliable a method of giving the information which is obviously necessary to make the chattel safe for those who use it and those in the vicinity of its use."

[5] With this exception in mind when considering the allegations of the complaint, we have the following situation: Defendant knew of the defects in the plank and the purpose for which it was to be used; that if so used it would create a dangerous condition; that the Newbys knew of these same defects, and, regardless of the danger created by the use of the plank, purchased it for use as a main support of the scaffold; that the plank was so used by them; that it broke, causing serious injury to plaintiff. Under these allegations we are of the opinion that there was tendered the issue of whether the fact of the acceptance of the defective plank by the Newbys for use in the scaffold should not of itself have warned defendant that the Newbys were so careless or inconsiderate of the safety of those using the scaffold that further warning to others than the Newbys should have been given by defendant in order to protect itself against claims for damages by those injured while lawfully using the scaffold. We are of the opinion that the question thus raised presents a question of fact and not one solely of law.

We have already cited numerous cases, some of them from this state, which hold that the plaintiffs, some of them employees, others members of families of, and still others occupying other relations to purchasers of dangerously defective articles, had causes of action against manufacturers or vendors. While the question we are considering was not raised in those cases in precisely the same form as it is presented here, the rights of actions could not have been supported had the courts been of the opinions that the orbits of duty of the vendors did not extend to and include the several plaintiffs, and that the injuries of the plaintiffs were not foreseeable at the time of the sale. We are of the opinion that in the instant case this question is one that should have been left to the trier of fact.

[6] We are also of the opinion that the question of whether the negligence, if any, of defendant was a proximate cause of the injury of plaintiff was one for the trier of fact. It is conceded that the Newbys were negligent. Whether their negligence was concurrent with that of plaintiff, if any, or was an independent act of negligence and was the sole proximate cause of plaintiff's injury which broke the chain of causation of defendant's negligence, if any, should not have been decided on demurrer under the allegations of the complaint. It may be that a jury might reasonably conclude that at the time of the sale of the timber, defendant knew and contemplated that it would be used by the Newbys in building the scaffold, and that such negligent use of it by the Newbys was part of the chain of causation from the negligence, if any, of defendant to the injury of plaintiff rather than break in this chain. Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N. Y. S. 657.

The portion of the judgment in favor of Horace Raymond Newby and Charles D. Newby is affirmed. The portion of the judgment in favor of Benson Lumber Company, a corporation, is reversed, and the trial court is instructed to overrule the demurrer of that defendant and give it a reasonable time within which to serve and file its answer.

We concur: BARNARD, P. J.; JENNINGS, J.

WEAVER et al. v. SHELL CO. OF CALIFORNIA et al.*

Civ. 9609.

District Court of Appeal, First District, Division 2, California.

Oct. 4, 1935.

Rehearing Granted Nov. 2, 1935.

1. Negligence 🔑134(11)

In action for death of decedent in charge of oil room who was burned in fire which occurred when gasoline receiving tank was being filled by oil company, evidence that oil company and its employee were negligent in allowing receiving tank to overflow, and that such negligence concurred with and proximately contributed to fire, *held* to support judgment for plaintiff, whether overflowed gasoline was ignited by static spark transmitted by oil company's employee, or some other act of employee, or act of some other person.

2. Trial 🔑89

In action for death of decedent in charge of oil room who was burned in fire which occurred when gasoline receiving tanks were being filled by oil company, striking of testimony of fire department chief concerning ordinance regulating installation of tanks at gasoline stations *held* not error where ordinance was not introduced in evidence.

3. Evidence 🔑581

Admission of evidence given by witness at former trial whom one witness testified had left state *held* not error, since slight evidence is sufficient to prove a negative.

4. Appeal and error 🔑1050(1)

In action for death of decedent in charge of oil room who was burned in fire which occurred when gasoline receiving tank was being filled by oil company from truck, permitting expert witness to state whether certain arrangement for filling tank was sufficiently safe to prevent fire from static electricity was erroneous but not prejudicial where witness subsequently testified that arrangement offered possibilities for transmission of static sparks.

5. Trial 🔑133(6)

Misconduct of plaintiff's counsel in argument consisting of accusation that defendants willfully suppressed evidence and injection of elements of wealth and poverty into case would not be considered where trial court of its own motion directed jury to disregard remarks.

6. Negligence 🔑121(2)

Application of res ipsa loquitur doctrine cannot be objected to solely on ground that plaintiffs particularized elements of negligence in their complaint.

7. Negligence 🔑138(2)

In action for death of decedent in charge of oil room who was burned in fire which occurred when gasoline receiving tank was being filled by oil company from truck, in which plaintiffs contended that oil company and its employee in charge of truck allowed gasoline to overflow and cause static spark to be generated by manner in which apparatus for filling tank was used, instructions applying res ipsa loquitur doctrine *held* not error in absence of showing that jury did not base verdict in favor of plaintiffs on plaintiffs' contention, notwithstanding that facts could not be proved without expert evidence.

8. Negligence 🔑139(2)

In action for death of decedent in charge of oil room who was burned in fire which occurred when gasoline receiving tank was being filled by oil company from truck, instruction that greater amount of care is required in dealing with dangerous agency than in ordinary affairs involving slight risk, and that while no absolute standard can be fixed by law, every precaution suggested by experience and known dangers should be taken, *held* not error as requiring more than ordinary care of oil company and its employee in charge of truck, where other instructions stated that oil company and its employee were required to exercise ordinary care.

9. Appeal and error 🔑1064(1)
Trial 🔑234(8)

Instruction that presumption is that evidence willfully suppressed could be, if produced, adverse to party suppressing it, and that higher evidence would be adverse from inferior being produced, was not the law and was not adverse to any evidence and should not have been given, but was not prejudicial where no material evidence was suppressed.

10. New trial 🔑76(5)

Verdict for damages for decedent's death will not be disturbed unless it is so plainly excessive as to suggest at first blush, passion or prejudice, or corruption on part of jury.

11. Death 🔑99(4)

$50,000 verdict for death of 37 year old man of good habits and in good health who had considerable life expectancy, who received monthly wage of $150 to $160 and who was supporting wife and two children, aged 8 and 13, and wife's two children by former marriage, *held* not excessive.

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Alice Weaver and others against the Shell Company of California

*For subsequent opinion see 57 P.2d 571.

and another. From a judgment for the plaintiffs, the defendants appeal.

Affirmed.

See, also, 129 Cal. App. 232, 18 P.(2d) 736.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Vincent W. Hallinan, of San Francisco, James H. Gillard, of Oakland, and William F. Herron, of San Francisco, for respondents.

STURTEVANT, Justice.

Lincoln Weaver was burned in a gasoline fire and from that injury he died January 22, 1927. His widow and two children commenced this action to recover damages. The jury returned a verdict in the sum of $50,000 and from the judgment entered thereon the defendants have appealed.

In the block located between Second and First streets and Washington and Broadway in Oakland, a private plant is maintained by the Pacific Gas & Electric Company to service its motor vehicles. An alley extends between Second and First streets. That alley is the entrance by which trucks serving the plant enter the premises. On the day of the accident the defendant Alfred H. Bodilly, acting as the servant of Shell Company of California, drove one of the gasoline trucks of the defendant corporation into the alleyway from Second street. He passed along the alley to the front of the oil room which faces the south and there he stopped to make his delivery. He was informed by the decedent, who was in charge of the oil room, that the portable tank, spoken of as the buggy, was to be filled, and he was also informed as to the quantity that was to be put into the sunken tank. The sunken tank extended under the south wall of the oil room. One valve of the tank was inside of the oil room and another valve was at the end of the tank outside of the oil room. They were of the same height. Each valve was covered with a metal cap which screwed on and off. Decedent took off the cap of the inside valve and stuck down a measuring rod, drew it out and handed it over to Bodilly to read. Whether decedent put back the cover on that valve does not appear. There is a plain inference he did not. Bodilly was using a General Motors truck having three compartments or tanks containing gasoline. The front one contained 643 gallons, the middle one 629 gallons and the rear one 438 gallons. All compartments were full. The truck was equipped with a two-inch hose about 15 feet long. It had a metal core encased in rubber with a cloth coating. One end was fitted to screw to the valve on the truck and the other end had an L-shaped metal nozzle. As the nozzle on the hose did not fit the valve on the Pacific Gas & Electric Company tank, a nipple was used. The nipple was inserted in the valve and the nozzle on the hose was placed in it. Having been informed by the decedent as to what quantity was wanted, the defendant Bodilly proceeded to make his deliveries. The truck he was using had attached to it a two-inch hose, whereas the one he ordinarily used had a one and one-half inch hose. Each hose had one and one-half inch attachments and therefore discharged about the same quantity. The foregoing, we think, are uncontroverted facts. In addition there was a great deal of evidence introduced. It contains numerous conflicts. It will be recited as we proceed.

In their first point the defendants claim that the judgment lacks evidentiary support for the reason that the evidence does not establish that any negligence of the defendants was the proximate cause of the death of Lincoln Weaver. Before proceeding, it should be stated that the trial proceeded on two very different theories. It was the contention of the plaintiff that Bodilly, in making his delivery, caused or allowed the gasoline to overflow the intake valve on the outside of the oil room, to spread out over the floors outside, to generate gasoline vapors, and then, by carelessly using apparatus that was not properly equipped, caused and allowed static sparks to be generated outside of the oil room and directly connected with the apparatus which the defendants were using, and allowed said sparks to ignite said gasoline vapors outside of said room and thus caused the fire which injured the deceased. Whereas it was the contention of the defendants that Bodilly spilled no gasoline, that the apparatus of the defendants generated no sparks and that if it did such sparks were properly grounded by a pendant chain attached to the delivery truck, and finally that the fire originated in the oil room of the gas station through causes over which the defendants had no control.

There was evidence that the truck Bodilly was using did not have a chain attached to the metal frame of the truck and extending to and resting on the ground for the purpose of conveying any electricity that might be generated; that he first attached the hose to the valve on the truck, placed the nozzle in position, and then opened the valve of the front tank, thus allowing the gasoline to flow into the sunken tank in the gas station; that in the exercise of ordinary care he should have stood by the valve ready to turn it off; that he did not do so, but left the hose running, and proceeded to fill the tank in the buggy with buckets; that after he had filled the buggy tank he was in the oil room when it was noted that the sunken tank was overflowing; that that tank overflowed outside and inside of the oil room; that at about the time the overflow commenced the decedent called out "Shut it off"; that at about that time a puff or explosion occurred which caused the windows to rattle and which was heard about the premises; that the overflow was of such a quantity of gasoline that it flowed several feet to the south and also to the east outside of the oil room; that the explosion was immediately followed by a fire which commenced outside the oil room and then spread outside and inside of the oil room; then when Weaver called "Shut it off," Bodilly shut it off and immediately turned and picked up the nozzle but, seeing fire near the end of it, dropped it back into position and hurried to one side to put out the fire on his own shoes and puttees; and that the act of Bodilly in dropping said nozzle under such conditions would tend to generate static sparks, ignite gasoline vapors, and cause explosions and fires. It will be freely conceded that several of the facts recited in this paragraph were controverted by other evidence. Before closing this statement of facts it should also be stated that while Bodilly was making his delivery several motor vehicles operated by the Pacific Gas & Electric Company called to be served. They received about 22 gallons, which was reported to Bodilly, and he increased his delivery to that extent. The last of those cars to be served left the pump only about two minutes before the fire.

[1] That the foregoing evidence showed an act of negligence on the part of the defendants in carelessly allowing the receiving tank to overflow we think is clear. We think it is also clear said act concurred with, and proximately contributed to, the fire which injured the decedent. Whether the overflowed gasoline was ignited by a static spark transmitted by an act of the defendant, or some other act of the defendant, or the act of some other person, did not relieve these defendants from their responsibility for allowing the tank to overflow. Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.(2d) 781. We think it is entirely clear that the judgment does not lack evidentiary support.

[2] The defendants complain of three several rulings of the trial court on the admission or exclusion of evidence. In 1924 or 1925 the city council of Oakland enacted an ordinance regulating the installation of tanks at gas stations. Certain articles had appeared in the local press concerning such legislation. The plaintiff called as a witness Samuel Short, who was at the time of the accident chief of the Oakland Fire Department. On cross-examination the defendants, without objection on the part of the plaintiffs, propounded many questions to him concerning the provisions of said ordinance, basing the questions, apparently, on the statements in the newspapers as to its provisions, but the ordinance was not offered in evidence. At one time the trial court was asked to construe the ordinance which had not been offered in evidence. It declined to do so. After the defendants rested, the plaintiffs made a motion to strike out the testimony given by the witness Short as to the provisions of the ordinance. The motion was granted. We see no error in that ruling. If the ordinance had been passed, if it contained anything material to the case of the defendants, competent proof of the facts was at the elbow of the defendants and should have been introduced. When Mr. Short was asked questions by the defendants regarding the ordinance, the plaintiffs were entitled to assume they would connect the proof. But they did not do so.

[3] At a former trial George Fulton was examined and cross-examined. At the last trial the plaintiffs called one witness who testified that Fulton had left the state. Thereupon the plaintiffs offered the evidence given by Fulton on the former hearing. The defendants made a "formal" objection. It was overruled. The ruling was not erroneous. Slight evidence is sufficient to prove a negative.

[4] The plaintiffs called L. L. Roth as an expert witness. Having qualified the witness as an expert, the following occurred:

"Mr. Hallinan: Q. With an oil truck parked and the gasoline being delivered through this hose into a filling stem set into a tank in the ground, the filling stem constituting the part from the red portion down, and this screwed on top of it (indicating), the hose put into it like that (indicating), do you consider that kind of an arrangement would be sufficiently safe to prevent any fire from static electricity?

"Mr. Alexander: To which we object as being incompetent, irrelevant and immaterial, and calling for his opinion as to a matter of safety rather than an opinion of an expert.

"The Court: Objection overruled.

"The Witness: If gasoline is flowing through that pipe line, it will generate static electricity. If there is a proper ground between the pipe, that inside pipe and the other intake or nipple, that will ground the static electricity, but if there is an improper connection between the two, you are apt to have a static spark."

Technically the ruling was erroneous. However, immediately thereafter the plaintiffs showed by the witness that the answer as given meant that the hookup described in the question offered possibilities for the transmission of static sparks. Such fact they were entitled to prove. The defendants were not prejudiced by the error mentioned.

[5] It is next claimed that the plaintiffs' counsel was guilty of prejudicial misconduct. They make three several attacks. They assert that plaintiffs' counsel, in addressing the jury, accused them of wilfully suppressing evidence and injected the elements of wealth and poverty into the case. Conceding that he did so, the defendants did not at the time assign such act as misconduct, nor did they ask the trial court to direct the jury to disregard the remarks. But of its own motion the court fully performed that duty. Defendants may not now present the point. Olsen v. Standard Oil Co., 188 Cal. 20, 26, 204 P. 393. No one of the attacks may be sustained.

[6, 7] Acting upon the request of the plaintiffs, the trial court gave two instructions, and, acting upon its own motion, it gave another instruction, each of which applied the doctrine of res ipsa loquitur to the facts of the case. The defendants assert that said doctrine was inapplicable because in their complaint the plaintiffs particularized the elements of negligence. The attack solely on that ground is insufficient. Atkinson v. United Railroads of San Francisco, 71 Cal. App. 82, 234 P. 863. Continuing, the defendants make other attacks in which they claim that under the evidence they were not in the exclusive charge of the instrumentalities causing the injuries, and that the evidence did not show others were not also responsible. These assertions are based upon their theory of the case. It will be conceded at once that the defendants did not have the exclusive management and control of the entire gas station nor of the entire oil room. However, it was the contention of the plaintiffs that the defendants allowed the gasoline to overflow and that the defendants caused a static spark to be generated by the manner in which they used the apparatus for filling the tank. Viewing the case as presented by the theory of the plaintiffs, we see no objection to the instructions complained of. The jury was not asked to bring in any special verdicts, and there is no reason to assume that the jury did not base its verdict on the theory presented by the plaintiffs. A further attack was made under the claim that the doctrine is inapplicable because the facts could not be proved without scientific or expert evidence. Defendants cite and rely on Nicholas v. Jacobson, 113 Cal. App. 382, 386, 298 P. 505. It does contain some words to that effect. But it was an action based on malpractice, and a special rule applies in such cases. Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642.

The defendants assert that instruction IV, given at the request of the plaintiffs, placed on the defendants the burden of proving its defense by a preponderance of the evidence. If the instruction is read in connection with the other instructions, we think it may not be said it was an erroneous statement of the law.

[8] Instruction VI, given at the request of the plaintiffs, in part was as follows: "The court instructs the jury that a greater amount of care is required in dealing with a dangerous agency than in the ordinary affairs of life or business which involve little or no risk. No absolute standard can be fixed by law, but every precaution suggested by experience and the known dangers ought to be taken." The defendants complain that the instruction was to the effect that the defendants should use more than ordinary care. When read in connection with the other instructions given, we think the contention has no merit. In many different places the trial court instructed the jury that the degree of care which the de-

fendants should have exercised was ordinary care.

[9] The defendants also complain because the trial court instructed the jury as follows: "I instruct you that under our law the presumption is that evidence wilfully suppressed could (sic) be, if produced, adverse to the party suppressing it, and that higher evidence would be adverse from inferior being produced." We think the instruction as written was not law, was not addressed to any evidence, and that it should not have been given. However, there was nothing that occurred during the trial and which the jury could have used for the purpose of charging either party with the suppression of any material evidence. The instruction as given was addressed to an incident hereinabove referred to but not fully set forth. At the time the accident happened there was employed by the Pacific Gas & Electric Company a man by the name of Martin Fahey, whose duty it was to investigate the facts regarding accidents. He investigated the facts regarding the accident in the instant case. He took some pictures. He interviewed the decedent and made some notes on that interview and in other respects prepared a report for his employer. That report was for some time among the files of the Pacific Gas & Electric Company. Afterwards Fahey died. At the time of the trial in the instant case witnesses testified that the file was no longer in the possession of the Pacific Gas & Electric Company. What had become of it the record failed to disclose. What was contained in the report that was competent and material evidence on the trial of the issues, the record wholly failed to disclose. The same remark applies to what was contained in the pictures. We find nothing in the record indicating that the Pacific Gas & Electric Company either suppressed or destroyed the file, or that the plaintiffs did so, or that the defendants did so.

When the witness Bodilly was on the stand and had testified as to the amount of gasoline contained in each tank on his truck and the intended use thereof, plaintiffs' counsel asked for an inspection of the records of the past deliveries by the witness. Defendants' counsel stated he would try to furnish the record. He was never asked if it had been obtained. At no time thereafter was the subject brought up until arguments were being made. It was then broached by an intimation of "suppression." We think even the jurors as laymen could and did see that the record mentioned was wholly immaterial to any issue before the jury. The front tank contained more than enough gasoline to meet the requirements of the Pacific Gas & Electric Company. We are wholly unable to state that in any respect the giving of the instruction complained of was prejudicial error as against either party.

[10, 11] Finally it is asserted that the verdict for $50,000 is excessive. The decedent was on January 22, 1927, the date of the accident, receiving a wage of $150 to $160 monthly and there was no proof that such employment was soon to be terminated. He was 37 years of age, of good habits, in good health, and had a considerable expectancy in years. He was married and was supporting his wife and her two children by a former marriage and Agnes and John, his two children by a former marriage, who were respectively 13 and 8 years of age. He was a kind and loving husband and father. The fact-finding body, the jury, by its verdict, has set the amount of the damages of decedent's widow and his two minor children in the sum of $50,000, as being a reasonable sum. By denying a motion for a new trial, the trial court has approved the award made by the jury. A court of review may not disturb that award "unless the verdict is so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Baker v. Board of Trustees, etc., 133 Cal. App. 243, 249, 23 P.(2d) 1071, 1073. We cannot say under the conditions shown to exist in the case that the verdict is excessive. In this connection the defendants point to the alleged misconduct of counsel and argue that the plaintiffs therein and thereby prejudiced the jury. But we have shown above that we think the record does not support that contention.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

9 Cal.App.2d 270

FIRST SECURITIES CO., Limited, v. STORY et al.

SAME v. HAVERTY.

Civ. 10081, 10095.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1935.

As Modified Oct. 16, 1935.

Hearing Denied by Supreme Court Nov. 22, 1935.

1. **Guaranty** ⚷9
   Pleading ⚷8(7)

Legal effect of terms of note was not enlarged by fact that note was headed "guarantee note" nor by allegations in pleading setting forth interpretation of assignee of payee of meaning of note.

2. **Guaranty** ⚷9

Word "guarantee" does not necessarily import contract of guaranty, but may import original obligation or promise.

[Ed. Note.—For other definitions of "Guarantee," see Words & Phrases.]

3. **Guaranty** ⚷44

Liability of guarantor does not accrue until default exists under original obligation.

4. **Guaranty** ⚷4

Contract is original promise and not one of "guarantee," when persons sought to be held are primarily liable prior to breach of contract by another.

5. **Guaranty** ⚷4

Note by which makers promised to pay on demand all funds advanced or loaned to third party *held* direct primary obligation to pay money on demand which was barred by four years' limitation statute, and not guaranty obligation, notwithstanding that note was headed "guarantee note" (Code Civ. Proc. § 337).

◆

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Actions by the First Securities Company, Limited, against Walter P. Story and others and against Sophia Haverty, as executrix of the estate of Thomas Haverty, deceased. From judgments in favor of the defendants, the plaintiff appeals.

Affirmed.

Farrand & Slosson, of Los Angeles, for appellant.

Ray Nimmo and William H. Hitchcock, both of Los Angeles, for respondents Walter P. Story and C. W. Cook.

Biby & Biby, John E. Biby, Chandler, Wright & Ward, and Leo Chandler, all of Los Angeles, for respondents F. W. Braun and Roy V. Boswell.

Kenyon F. Lee, of Los Angeles, for respondents Guy Cochran, C. S. Thomas, Allen T. Archer, F. B. Lewis and Garretson Dulin.

Kenyon F. Lee, in pro. per.

Bradner W. Lee, in pro. per.

Edward Brody, of Los Angeles, for respondent Wm. L. Riley.

Charles L. Nichols, of Los Angeles, for respondent F. G. Hoffine.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for respondent Sophia Haverty.

WILSON, Justice pro tem.

This is an appeal from a judgment in favor of respondents following the sustaining of their demurrer to the second amended complaint without leave to amend.

It is alleged that, while Glenoaks, Inc., was engaged in subdividing and selling a tract of land in Los Angeles county, it sought to obtain from appellant's assignor, Pacific-Southwest Trust & Savings Bank, the sum of $625,000, and proposed to sell its bonds to the bank in the said amount; that the bank agreed to purchase the said bonds upon condition that the payment thereof be guaranteed by the respondents; that, for the purpose of inducing the bank to purchase the bonds, the respondents executed an instrument in writing which appellant asserts is an agreement of guaranty, whereupon the bank purchased the bonds and Glenoaks, Inc., executed a trust indenture securing the same. Default having occurred in the payment of the bonds, this action was commenced to recover from the respondents the amounts alleged to have been guaranteed by them respectively.

The instrument sued upon bears the heading "guarantee note," and by its terms the respondents promised to pay all sums of money which the bank had theretofore advanced or loaned or might thereafter advance or loan to Glenoaks, Inc., under said bond issue, or upon bills receivable, drafts, or other evidences of indebtedness, "said advances and loans being made at our special instance and request, and upon the faith of this undertaking." No claim is made by appellant that any amounts were advanced to Glenoaks, Inc., except upon the bonds. If, as maintained by respondents, the document was a direct primary obligation to pay money on demand, the action is barred by the provisions of section 337 of the Code of Civil Procedure, while, if the appellant is correct in its assertion that the instrument is one of guaranty, the same is not barred.

The agreement referred to reads as follows: "Guarantee Note. In consideration of the sum of Ten Dollars, to us in hand paid by Pacific-Southwest Trust & Savings Bank of Los Angeles, California, the receipt whereof is hereby acknowledged, and for divers other valuable consideration, I/or we jointly and severally promise to pay to the said Pacific-Southwest Trust & Savings Bank of Los Angeles, California, or to their order, on demand, in gold coin of the United States of America, any and all sums of money which the said Pacific-Southwest Trust & Savings Bank of Los Angeles, California, may have heretofore advanced or loaned, or may hereafter advance or loan to Glenoaks, Inc., under a certain bond issue in the total amount of Six Hundred Twenty-Five Thousand Dollars ($625,000.-00) covering certain real property now owned by Glenoaks, Inc. and payment of which is guaranteed proportionately by us, or upon bills receivable, drafts, overdrafts, acceptances, or other evidences of indebtedness, together with interest thereon, from the time the same are, or were made or allowed, respectively, at the rate of 6½ per cent per annum, said advances and loans being made at our special instance and request, and upon the faith of this undertaking; and we hereby authorize said Pacific-Southwest Trust & Savings Bank of Los Angeles, California, at any time and in such manner and upon such terms, and for such time as it may see fit, to extend or change the time or manner for the payment of said sum or sums of money, or any part thereof, without any notice to the undersigned, or to any or either of them and we hereby agree beforehand that no such change or extension of time or credit, shall in any manner affect our liability hereon. It is hereby understood and agreed that the amount of the liability of the undersigned under this agreement shall not exceed the amount of our proportionate share as set out below, of the principal and interest of the bond issue, and also of the 5/60 interest apportioned to John R. Powers. The right of said bank to demand, and the obligation of the undersigned to pay such indebtedness, shall not be affected by the fact that the said Bank is, or may be at the time, holding collaterals or property to secure such indebtedness. It is further understood and agreed that this is and shall be a continuing guarantee, and shall remain in full force and effect until written notice shall have actually been received by said Pacific-Southwest Trust & Savings Bank of Los Angeles, California, that as to further advances or loans it has been revoked by the undersigned. It is further expressly understood and agreed that said Bank need not give, and the undersigned hereby expressly waive—, any notice to the undersigned, or to any or either of them, of the acceptance by said Bank of this guarantee note, or of indebtedness or other obligations incurred by said Glenoaks, Inc. to said Bank. It is further understood and agreed that no act or omission of any kind on the part of said Bank in the premises shall in any way whatsoever affect or impair this undertaking. December 13, 1926." Then follows the signatures of the obligors and a specification of the fractional part of the obligation which each assumes.

[1, 2] The fact that the instrument is denominated a "guarantee note" will be disregarded, as will the allegations in the second amended complaint that the payment of the bonds was guaranteed by respondents, if the language of the instrument itself does not bear such construction. The legal effect of the terms of the signed document is not enlarged by the heading of the latter, nor by the allegations in the pleading setting forth appellant's interpretation of the meaning of the document. The word "guarantee" does not necessarily import a contract of guaranty, but may import an original obligation or promise. Meyer v. Moore, 72 Cal. App. 367, 237 P. 550. The nature of the obligation, whether primary or secondary, is the determining feature.

[3-5] Appellant alleges in its pleading that it had been agreed, before the note was signed, that the bonds were to be secured by a deed of trust upon land owned by Glenoaks, and it is further alleged that Glenoaks executed a trust indenture conveying real property to the bank to secure payment of principal and interest of the bonds. Notwithstanding this fact, the note expressly provides that the right of the bank to demand payment of the indebtedness and the obligation of respondents to pay the same shall not be affected by the fact that the bank is holding collaterals or property to secure such indebtedness. The

bank was given the right to sue the makers of the note, even though it held ample security for payment of the amount advanced by it, and even though there were no default on the part of Glenoaks. If this were a contract of guaranty, the liability of the guarantors would not accrue until a default existed under the original obligation. When the persons sought to be held are primarily liable, prior to the breach of the contract by another, the contract is an original promise and not one of guaranty. Scribner v. Schenkel, 128 Cal. 250, 60 P. 860; Malone v. Crescent City, etc., Co., 77 Cal. 38, 18 P. 858. The respondents did not guarantee payment of the bonds, but promised to pay, on demand, all sums advanced or loaned by the bank. By the terms of the note the promise was absolute and was not conditional upon nonpayment of the bonds. The instrument pleaded is not ambiguous and may be interpreted by its contents without explanatory evidence.

The judgments are affirmed.

We concur: CRAIL, P. J.; WOOD, J.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. CRYER et al.*

Civ. 10388.

District Court of Appeal, Second District, Division 2, California.

Sept. 25, 1935.

Hearing Granted by Supreme Court Nov. 21, 1935.

1. Corporations 🔑259(1)

Stockholder's liability is enforceable independently of proceedings against corporation.

2. Corporations 🔑252

Prior foreclosure of mortgage securing notes which had been guaranteed by corporation *held* unnecessary in order to recover against stockholders for debt which was secured by mortgage.

3. Corporations 🔑484(3)

Corporation's guaranty of payment of principal and interest of notes secured by mortgage, on or before date of extended maturity, *held* promise to pay obligation as whole without qualification and without limitation to possible deficiency as against contention that corporation guaranteed only the amount to be found due by deficiency judgment.

4. Corporations 🔑416

Where corporation's board of directors had authorized vice president and secretary to borrow specified amounts of money, execution of instrument guaranteeing payment of notes which had been executed previously by secretary of corporation's president *held* within ostensible authority of vice president and secretary of corporation.

5. Corporations 🔑426(7)

Corporation which, with knowledge of facts, paid interest on notes for ten months after execution of corporation's guaranty of payment of notes by vice president and secretary *held* to have ratified action of such officers in guaranteeing notes.

6. Corporations 🔑237

Typographical error in omission of word "Furniture" from name "Blue Bird Furniture Manufacturing Company" in instrument which guaranteed payment of notes by that corporation *held* insufficient to relieve stockholders of corporation from liability for payment of notes, where it was not disputed that instrument was executed by officers of corporation of which defendants were stockholders, or that such corporation acted upon instrument as its own and received benefits therefrom.

7. Courts 🔑121(4)

Superior court has jurisdiction to entertain action where sum total of amounts claimed in several counts is sufficient to bring action within court's jurisdiction, and fact that plaintiff ultimately recovered less than $2,000 against one or more of individual defendants did not deprive court of jurisdiction.

8. Courts 🔑122

In action to enforce stockholders' liability for debts of corporation, where complaint named nine stockholders as defendants and asked judgments against them in sums varying from $108,359.49 and interest, to $2,167.70 and interest, plaintiff's bad faith in bringing action within superior court's jurisdiction was not shown as against contention that plaintiff must necessarily include interest on sum alleged to be due in order to bring demand within jurisdiction of court.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by the Bank of America National Trust & Savings Association against George E. Cryer and others, and Agnes B. Mullaney, and others. From a judgment

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 58 P.2d 643.

for defendants on the first cause of action, plaintiff appeals, and from a judgment for plaintiff on the second cause of action, defendants Agnes B. Mullaney, and others, appeal.

Affirmed in part, and reversed in part.

Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant Bank of America Nat. Trust & Savings Ass'n.

George E. Cryer and R. Alston Jones, both of Los Angeles, for defendants Cryer and Mullaney.

John A. Jorgenson, of Los Angeles, for defendant Waite.

Nichols, Cooper & Hickson, of Pomona, for defendant Norwood.

Hurt, Farner & Hurt, of Los Angeles, for defendant Page.

WOOD, Justice.

Plaintiff bank commenced this action against various stockholders of Blue Bird Furniture Manufacturing Company to enforce payment of the respective amounts due on their liability as such stockholders for the debts of the corporation. On the first cause of action judgment went for defendants and plaintiff appeals. On the second cause of action plaintiff recovered and certain defendants appeal.

A mortgage was executed by one Erma Blacksmith in favor of the predecessor in interest of plaintiff, dated May 29, 1923, to secure a loan of $125,000 and a loan subsequently to be made. At a later date an additional sum of $50,000 was loaned on the security of the mortgage. The property mortgaged was in fact owned by the Blue Bird corporation, and Erma Blacksmith was the secretary to the president of the corporation, all parties agreeing that she was what is commonly called a "dummy" in transactions of this kind. Immediately upon the execution of the mortgage the property was deeded by Erma Blacksmith to the corporation. On April 23, 1930, the Blue Bird corporation requested of plaintiff an extension of one year on the notes for which the security was given. In the communication to plaintiff the corporation reviewed the facts of the execution of the Blacksmith notes and mortgage, recited that title had been vested in Erma Blacksmith "for the purposes of convenience" and promised to pay the amount of the notes in this language: "The undersigned corporation also covenants and agrees to pay or cause to be paid by or in the name of the mortgagor in said mortgage named, the principal and interest of the promissory notes secured thereby on or before the date of the extended maturity thereof." The extension was granted by plaintiff, and the notes not having been paid within the extended period, this action was commenced.

[1-3] It is contended that the action was prematurely commenced, since the mortgage had not been foreclosed when the complaint was filed. This contention cannot be upheld. A stockholder's liability is enforceable independently of proceedings against the corporation. It was not necessary to first foreclose the mortgage in order to recover against the stockholders. Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1380; Chambers v. Farnham, 182 Cal. 191, 187 P. 732; Fry v. Baltimore Hotel Co., 80 Cal. App. 415, 252 P. 752; 6 Cal. Jur. 995. Respondent stockholders argue that the corporation guaranteed only the amount to be found due by a deficiency judgment. We cannot take this view. The language used in the instrument is clearly a promise to pay the obligation as a whole, without qualification and without limitation to a possible deficiency. Although the right to sue is not affected thereby, it might be added that the mortgage was in fact foreclosed before the present action was brought to trial, and the judgment rendered against defendants is for the respective amounts due on the deficiency after sale of the property. These matters are set forth in a supplemental complaint.

[4, 5] It is next contended that the corporation was not bound by the instrument signed by its vice president and secretary. On March 27, 1928, the board of directors of the corporation passed a resolution authorizing these same officers, specifically naming them, to borrow $200,000 from the predecessor in interest of plaintiff bank upon the security of the property of the corporation. No meeting of the board was held between June 27, 1929, and July 22, 1930, at which last-mentioned date a resolution was passed authorizing the same two officers to borrow a certain sum from another bank. Erma Blacksmith was the agent of the corporation in the transaction. The corporation owned the mortgaged property, received and used the proceeds of the loan and paid interest on the loan, with knowl-

edge of all the facts, for a period of nearly ten months after the execution of the instrument. The corporation made no effort to repudiate the action of its officers. Manifestly, the two officers had at least ostensible authority to enter into the agreement on behalf of the corporation. Fairbanks v. Crump Irr., etc., Co., 108 Cal. App. 197, 291 P. 629, 292 P. 529. The finding of the trial court that the officers of the corporation had no authority to bind the corporation is without support in the evidence and is inconsistent with other findings. Moreover, the corporation, by paying interest over a considerable period of time after the execution of the instrument, with knowledge of the facts, must be held to have ratified the action of its officers. Tierney & Lawford, Inc., v. Wilshire Café Co., Inc., 209 Cal. 605, 289 P. 621; Pan-American Bank v. Crawford, 108 Cal. App. 1, 291 P. 220.

[6] The communication addressed to plaintiff proposing the extension bears the name "Blue Bird Manufacturing Co.," by its vice president and secretary. It is now argued that the stockholders of the Blue Bird Furniture Manufacturing Company are not bound by the instrument. There is no merit in this contention. The omission of the word "Furniture" evidently resulted from an error by the typist. It is not disputed that the instrument was executed by the officers of the corporation of which defendants were stockholders, or that such corporation acted upon the instrument as its own and received the benefits therefrom.

[7, 8] Those defendants who have appealed from the judgment in favor of the plaintiff on the second cause of action contend that the superior court was without jurisdiction to enter judgment in amounts less than $2,000. The complaint names nine stockholders as defendants and asks judgments against them in sums varying from $108,359.49 and interest to $2,167.70 and interest. The sums asked are made up by adding the amounts claimed in the two causes of action. It has been held that the court has jurisdiction to entertain an action where the sum total of the amounts claimed in several counts is sufficient to bring the action within the jurisdiction of the court. Burke v. Maguire, 154 Cal. 456, 98 P. 21; Ventura County v. Clay, 114 Cal. 242, 46 P. 9. The fact that plaintiff ultimately recovered less than $2,000 against one or more of the individual defendants does not deprive the court of jurisdiction. The ad damnum clause in the complaint is the test of jurisdiction. Bailey v. Sloan, 65 Cal. 387, 388, 4 P. 349.

Appellant stockholders contend that plaintiff must necessarily include interest on the sum alleged to be due in order to bring the demand within the jurisdiction of the court. This contention is resisted by respondent bank, but it is not necessary to pass upon the point. It cannot be said that under the circumstances of this case the plaintiff acted in bad faith in making allegations sufficient to give jurisdiction to the superior court. Rodley v. Curry, 120 Cal. 541, 52 P. 999.

The judgment is reversed as to the first cause of action and affirmed as to the second cause of action.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

PAPINEAU v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. *

Civ. 5341.

District Court of Appeal, Third District, California.

Sept. 25, 1935.

Hearing Granted by Supreme Court Nov. 22, 1935.

1. Pleading 🔑166

Allegations concerning assignment set up in defendants' answer as defense to plaintiff's action must be deemed denied by plaintiff, notwithstanding absence of express denial, in view of statute specifying that new matters contained in answer are deemed controverted by opposite party (Code Civ. Proc. § 462).

2. Trusts 🔑283(1)

Where trustee and buyer of beneficiary's interest at trustee's sale based their defense to action by assignee of such beneficiary's interest upon a previous assignment, door was opened as to validity of previous assignment and conditions under which it was made, and, where such conditions required full proof that statute relating to dealings with trust property had been fully complied with, plaintiff

*For subsequent opinion see 59 P.2d 131.

could urge fraudulent nature of transaction (Civ. Code, §§ 2219, 2229, 2235).

3. Appeal and error ⚷891

Where, if appellant were allowed to present additional testimony to District Court of Appeal, practically main issues in case would have to be reviewed and determined by District Court of Appeal, appellant *held* not entitled to present such testimony, since reference, if necessary, could best be had by remanding cause for new trial.

4. Trusts ⚷283(1)

In action by assignee of beneficiary's interest in trust against trustee and buyer at trustee's sale pursuant to prior assignment, wherein purchase was attacked on ground of insufficiency of consideration, buyer *held* to have had knowledge of value of property in view of fact that he had managed trust property for considerable period of time.

5. Trusts ⚷283(1)

Party who, by reason of having acted as agent for trustee in management of property, had acquired knowledge of value of property, could not by resigning from such position be allowed to take advantage of knowledge so acquired in purchasing for insufficient consideration beneficiary's interest in trust at trustee's sale.

6. Trusts ⚷283(1)

Note for $5,000 and assignment of beneficiary's interest in trust as security, procured by trustee bank from beneficiary, *held* an "advantage" procured by trustee within codal provision that all transactions between trustee and beneficiary during existence of trust, or while influence acquired by trustee remains, by which trustee obtains any "advantage" from his beneficiary, are presumed to be without consideration and under undue influence (Civ. Code, § 2235).

[Ed. Note.—For other definitions of "Advantage," see Words & Phrases.]

7. Trusts ⚷283(1)

Where trustee bank procured assignment of beneficiary's interest in trust as security for payment of $5,000 note and thereafter sold beneficiary's interest to trustee's agent and member of executive committee for benefit of beneficiaries named in trust agreement, in action by holder of subsequent assignment of beneficiary's interest, burden was on bank and buyer of interest at trustee's sale to overcome presumption of insufficient consideration and undue influence, since buyer was also a "trustee" (Civ. Code, §§ 2219, 2229, 2235).

[Ed. Note.—For other definitions of "Trustee," see Words & Phrases.]

8. Trusts ⚷283(1)

When a transfer or assignment is made by beneficiary to trustee, trustee must show that there was sufficient consideration and that no undue influence was exercised (Civ. Code, § 2235).

9. Trusts ⚷283(1)

Trustee bank could not avoid duties of trustee in dealing with beneficiary of trust by claim that dealings with trustee were by bank as such and not as trustee (Civ. Code, §§ 2219, 2229, 2235).

10. Trusts ⚷283(1)

In action by subsequent assignee of beneficiary's interest in trust against trustee who procured prior assignment and trustee's agent and member of executive committee for benefit of beneficiaries in trust who bought beneficiary's interest at trustee's sale, findings that trustee had made no untrue statement to plaintiff and had not concealed any facts *held* insufficient to support judgment for defendants, in absence of proof that transactions with beneficiary were supported by sufficient consideration, and that there was no undue influence (Civ. Code, §§ 2219, 2229, 2235).

11. Trusts ⚷283(1)

That beneficiary of trust had made prior assignment of his interest as collateral security for payment of obligation did not prevent his subsequent assignment of same interest, though each assignment purported to convey the whole interest, since second assignment would attach only to residue, and upon payment of debt assignor's interest would revert to him and be subject to further disposition.

12. Trusts ⚷262

In action by assignee of beneficiary's interest in trust against trustee and buyer at trustee's sale pursuant to prior assignment, evidence that plaintiff had judgment against beneficiary *held* admissible to show plaintiff's right to subject beneficiary's interest to payment of indebtedness.

13. Estoppel ⚷55

Where plaintiff did not rely upon and was not misled by any statements made by defendants, no basis for an estoppel existed.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by O. L. Papineau against the Security-First National Bank of Los Angeles and others. From a judgment for defendants, plaintiff appeals.

Reversed, with directions.

For prior opinion, see 46 P.(2d) 756.

Le Roy B. Lorenz and Raymond Tremaine, both of Los Angeles, for appellant.

Frank P. Doherty, William R. Gallagher, and Clay & Handy, all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

A rehearing was granted in this cause, not because the court was dissatisfied with its conclusions heretofore reached, but for the reason of the assumption and somewhat lengthy argument contained in the petition on rehearing to the effect that this cause had been decided upon a theory different from that upon which the trial was had in the trial court, and upon issues not involved in the action. A re-examination of the transcript, including the pleadings, demonstrates the errors contained in the petition for a rehearing.

[1] After denying the material allegations of the plaintiff's complaint, the defendants set up an affirmative defense seeking to establish the fact that the rights of the defendants, and especially of the Security-First National Bank at Los Angeles, depended upon a prior assignment. It is true that this assignment was not denied by any pleading filed by the plaintiff, but the respondents apparently overlook the provisions of section 462 of the Code of Civil Procedure which specifies that "new matters" contained in an answer are deemed controverted by the opposite party. That the ownership of the beneficial interest of the property involved in this action was the issue before the court, and was so understood by the court, which necessarily included the validity of the assignments and all proceedings thereunder, is shown by the following excerpts taken from the transcript:

"By the Court: The whole controversy lies around the rights and liabilities of the parties in and to that beneficial interest, nothing else. I think I made the statement before, that the matter to be decided is as to who owns that beneficial interest. Now, if this court decides this plaintiff owns that beneficial interest, and it should be paid, the judgment would be rendered accordingly, and you can take such means as you have at your command to enforce that judgment."

We quote, also, from the transcript, the following statement of counsel for respondents: "There was a 1925 assignment; there was a sale under that assignment in which Ernest Ganahl was a purchaser. Now, the witnesses are here in court to prove that. I am going to prove it as a part of my case, and then the court can pass upon every issue as defined to be an issue. Has Mr. Papineau any interest in the trust?"

[2] Having based their defense upon a previous assignment, the door was opened as to the validity of that assignment, and the conditions under which it was made, and the circumstances being such, as hereinafter shown, as to require full proof that the sections of the Code relating to dealings with trust property had been fully complied with, devolved upon the respondents, and likewise opened the door permitting the plaintiff to urge the fraudulent nature of the transaction.

We also desired time to look into the application of respondents for leave to present additional testimony to this court.

[3] By reason of what is hereinafter stated, we think that the application to present additional testimony is not within the contemplation of rule No. 38 of the Supreme Court governing such procedure.

Practically the main issues in the case would necessarily have to be reviewed and determined by this court, for the reason that not only the validity of the assignment upon which the respondent bases its rights, but also the subsequent sale and the proceedings had in relation thereto would have to be determined as questions of fact, necessitating a reference which can be more readily had by remanding the cause for a new trial if so determined.

[4, 5] The issues presented to us upon this rehearing are no different from the issues originally presented, and the arguments are almost identical, save as to what we have herein set forth, and the contention that the defendant Ernest Ganahl did not have knowledge of the value of the property, which seems to us wholly untenable in view of the fact that he had charge thereof for a considerable period of time, collecting rents, etc., and likewise is untenable the contention that after acting as trustee for a considerable period of time he resigned such position. Having acquired knowledge by reason of a confidential relation, he could not, by resignation, be allowed to take advantage of knowledge acquired during his agency or trusteeship.

For the foregoing reasons we adopt the opinion heretofore rendered by this court, as follows, to wit:

Stripped of all verbiage, and stated in plain language, the theory upon which this case was tried, and the issues presented by the pleadings and the testimony, involves just one issue, to wit: Whether an assignment of a one-tenth interest in a certain trust deed made by the defendant Vincent P. Ganahl, on the 23d day of July, 1925, or a certain other assignment of the same interest, dated July 18, 1929, should take precedence. This issue involves inquiry as to the validity of the assignment dated July 23, 1925, and the sale of the one-tenth interest made in pursuance thereof.

On the 7th day of October, 1916, Mrs. Louise Ganahl and nine other persons, including Ernest Ganahl and Vincent P. Ganahl, made, executed and delivered to the German-American Trust & Savings Bank of Los Angeles a certain instrument of trust, whereby certain property set forth in the record, aggregating in value many thousands of dollars, was placed in the possession, custody, and control of the German-American Trust & Savings Bank, as trustee. This instrument of trust named Vincent P. Ganahl, Rose E. Donovan, Ernest Ganahl, and Mrs. Louise Ganahl as executive committee of said beneficiaries to act in behalf of all the beneficiaries named in the trust instrument. Ernest Ganahl was appointed agent of the trustee to collect the rentals of the property mentioned in the trust, and generally, to care for and have the custody of the real property and the improvements thereon, as set forth in the instrument of trust. The defendant Security-First National Bank of Los Angeles, a corporation, has succeeded to the interest of the German-American Trust & Savings Bank, and during all the times mentioned in this action was, and still is, the trustee, and acting under said trust instrument.

On the 23d day of July, 1925, Vincent P. Ganahl borrowed from the Security Trust & Savings Bank of Los Angeles, a corporation, the sum of $5,000, and to secure the payment thereof within the time mentioned in a promissory note evidencing that sum, executed and delivered an assignment of his one-tenth interest in and to the trust above mentioned. The assignment, in part, reads as follows: "This assignment, made this 23rd day of July, 1925, between Vincent P. Ganahl, assignor, Security Trust & Savings Bank, a corporation, of Los Angeles, California, trustee, and Security Trust & Savings Bank, trustee under Trust G—759, payee * * *. Said assignor, by these presents, hereby does assign, transfer and set over unto said trustee, in trust, with power of sale, his entire undivided beneficial interest in and to the trust, evidenced by certain declaration of trust issued by Security Trust & Savings Bank, trustee, under its Trust G—579; subject, however, to all terms and conditions of said declaration of trust; together with a like interest in and to the proceeds and avails arising or growing out of said trust; the trustee thereunder hereby being authorized to pay and turn over unto said payee all moneys and benefits growing out of the interest hereby assigned." The instrument of assignment specifically mentions that it is given to secure the payment of the $5,000 borrowed money, and certain costs and expenses mentioned in the assignment.

Following certain business negotiations culminating the entering into of an agreement of purchase by Vincent P. Ganahl with the plaintiff, for certain property located at Lake Arrowhead, in San Bernardino county, for the sum of $40,000, to secure the payment of which Vincent P. Ganahl, on the 18th day of July, 1929, executed and delivered to the plaintiff a certain instrument of assignment whereby he transferred all his reversionary interest, consisting of a one-tenth interest in and to the trust first mentioned herein, to the plaintiff as security for the payment of said $40,000, and authorized the Security-First National Trust & Savings Bank, as trustee, to pay over to the plaintiff all moneys, property, and benefits growing out of, or arising by reason of, his reversionary interest in and to said trust. On the 18th day of July, 1929, the Security-First National Trust & Savings Bank acknowledged receipt of the original of said assignment in the following words and figures: "The receipt of the original of this assignment is hereby acknowledged this 18th day of July, 1929. (Signed) Security-First National Trust & Savings Bank, by E. B. Pentz, Assistant Trust Officer."

The $5,000 borrowed by the defendant Vincent P. Ganahl, as aforesaid, not having been paid, the defendant bank in this action, as a trustee under the assignment made by Vincent P. Ganahl, dated July 23, 1925, proceeded to, and did, on the 17th day of January, 1931, sell, all and singular, the interest of the said Vincent P. Ganahl in and to the trust first mentioned herein, at which sale the defendant Ernest Ganahl became the purchaser upon his bid of the sum of $5,392.83.

The court found, as set forth by the respondents, that neither the defendant Security-First National Bank of Los Angeles nor any of its officers or agents, made any false, fraudulent, or untrue statements whatever to the plaintiff; likewise, that neither said bank, nor any of its officers, falsely, fraudulently, or otherwise concealed any matters of fact concerning said trust, or the assignment of said one-tenth interest made by the said Vincent P. Ganahl; and further found that the plaintiff had not been injured by any of the acts or conduct, statements or representations on the part of the defendants. The court further found that the officers of the defendant bank, at the time of the assignment executed and delivered by Vincent P. Ganahl, informed the plaintiff of the prior assignment. It may be here noted that the plaintiff offered testimony controverting the finding just mentioned.

Upon the findings, the substance of which we have just mentioned, it is contended that the respondents must prevail. This contention, however, overlooks the fact that there is no finding made by the court, nor was there any testimony introduced, to which our attention has been called, or which we have been able to discover by an examination of the record, conforming to, or tending to conform or comply, with the requirements of section 2235 of the Civil Code, which reads: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." There is not a word of testimony in the record that we have been able to discover, indicating that the assignment made by Vincent P. Ganahl, on the 23d day of July, 1925, to the German-American Trust & Savings Bank, to the interest of which the defendant bank in this case has succeeded, and also to the performance of the obligations of which the defendant bank has assumed, was made upon sufficient consideration, and not under undue influence.

[6] That the obtaining of the note and assignment was an advantage secured by the trustee is certainly not open to question. In this particular the following language from the case of Metropolis, etc., Savings Bank v. Monnier, 169 Cal. 592, 147 P. 265, 268, is applicable: "The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration, and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Certainly the obtaining of a note for $20,000, secured by mortgage is an advantage, and the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction. On the question of the applicability of the presumption declared by section 2235, it is sufficient to refer to Cooley v. Miller & Lux, 156 Cal. 510, 512, 523, 105 P. 981, and authorities there cited. See, also, Cooley v. Miller [168 Cal. 120], 142 P. 83, 88."

[7] The purchaser of the one-tenth interest in the trust made by the sale of the trustee was expressly named as the agent of the trustee in the trust agreement executed and delivered as first herein stated. He was also one of the executive committee for the benefit of the beneficiaries named in said trust agreement. He was charged with looking after the properties mentioned therein, and the profits arising therefrom, for the benefit of the beneficiaries, which of course included the interest of Vincent P. Ganahl named in the trust agreement as one of the beneficiaries.

This brings all the actions of Ernest Ganahl within the terms and provisions of section 2219 of the Civil Code defining what constitutes a trustee. He had all the information as to the value of the trust, and he stood in the relation of confidence as to the property of said trust, as well as having control thereof.

The record shows that at the time of the sale made by the bank as trustee, and the purchase of the one-tenth interest by Ernest Ganahl, the plaintiff in this case appeared and protested against the sale, claiming his right thereto by reason of the assignment made to him on July 19, 1929. The purchase by Ernest Ganahl invokes the application of the rule set forth in section 2229 of the Civil Code, to wit: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." We may here state that there is testimony in the record to the effect that the property included in the trust agreement was of the value of at least $170,000, estimated by some of the testimony to be worth a great deal more, but assuming that that figure is approximately correct, the one-tenth interest would be worth at least the sum of $17,000, of which Ernest Ganahl, as the agent of the trustee in charge thereof, must be held to have had full knowledge.

While the sale which we are considering was made by a trustee to the agent of the trustee, and the transfer was made by the trustee to its agent, we think the following rule set forth in the case of Differding v. Ballagh, 121 Cal. App. 1, 8 P.(2d) 201, 203, applicable: "When a trustee attempts to transfer to himself, as an individual, property of the trust, the transaction is void. The rule is thus stated in 25 California Jurisprudence, 136: 'If, acting in his fiduciary capacity, the trustee has assumed to deal with himself as an individual, the transaction will be held to be invalid.' The rule is absolute; it does not depend upon any showing of bad faith on the part of the trustee, or injury to the trustor or principal. While issues in respect to the fairness of the transaction may be determinative of the controversy in the absence of any fiduciary or trust relationship, when this relationship is disclosed, any inquiry in this respect is at an end."

[8] The respondent bank, in simply offering testimony that the assignment made by Vincent P. Ganahl on the 23d day of July, 1925, was made in consideration of a loan of $5,000, stopped short of complying with the requirements of section 2235, supra. Just as said in the case of White v. Warren, 120 Cal. 322, 49 P. 129, 52 P. 723, 724: "Defendant, in offering evidence tending to prove the money to be a gift from the wife, and resting his case at that point, rested too soon. Such evidence, standing alone, compassed his defeat, for by reason of the evidence the presumption of undue influence arrayed itself against him." See, also, the case of Wehner v. Wehner, 68 Cal. App. 789, 230 P. 458, and cases cited in that opinion. It is not a question of actual fraud, but whenever a transfer or assignment is made by a beneficiary to a trustee, it becomes incumbent upon the trustee to introduce testimony showing that there was a sufficient consideration, and that there was exercised no undue influence. In other words, that the transfer and assignment was the free and voluntary act of the beneficiary. The defendant bank in this case has set up his assignment, made of his one-tenth interest by Vincent P. Ganahl, which, of course, under the system of pleading followed in this state was automatically denied. Sterling v. Smith, 97 Cal. 343, 32 P. 320.

[9] The contention made by the respondents, in substance, that the $5,000 was loaned by the defendant bank as a *bank,* and not as a bank acting as trustee under the trust assignment mentioned in this opinion, and that the bank as an individual identity separated itself into two separate capacities, and with its right hand handed out $5,000 to the beneficiary, and with its left hand received from the beneficiary an assignment in which it was named as trustee and empowered to act as trustee, is wholly untenable.

The record shows that when the agent Ernest Ganahl turned over the purchase price it was credited to the Ganahl trust.

A sufficient answer, also, to the foregoing contention of the respondents is found in 26 Ruling Case Law, p. 1325, § 189, from which we quote the following: "Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He shall not be allowed to serve himself under the pretense of serving his cestui que trust. The most usual way in which evasions of this salutary rule are attempted is in purchases of the trust estate or by or in the interest of the trustee. That such purchases shall not be allowed the realization of their purpose is the universal holding of the courts, except with the express consent or under a special permission given by a court of competent jurisdiction. This wise and salutary rule, designed to protect the weak and incompetent from the encroachments and overreachings of the artful and the powerful, is founded upon two principles. The one is, that the trustee has no right to derive any benefit or advantage from the trust fund; but all his skill and labor in the management of it must be directed to the advancement of the interest of his cestui que trust, and the other is that a trustee will not be permitted to create in himself an interest opposite to that of the party for whom he acts."

In support of the rules which we have heretofore stated, we may also cite the following cases: In re Frazin & Oppenheim (C. C. A.) 181 F. 307; Mamlock v. Williams, 55 Cal. App. 175, 202 P. 927; City of Fort Bragg v. Brandon, 41 Cal. App. 227, 182 P. 454; 2 Pomeroy, Eq. Juris., § 928.

[10] Not having introduced any testimony relative to the sufficiency of the consideration, or that the assignment it received was not executed under undue influence, it follows that the burden of proof cast upon the respondent bank by section 2235, supra, has not been sustained; and the findings referred to in respondents' brief of which we have made mention, without there being further testimony and further findings, are insufficient to sustain the judgment of the court in this case.

As the case must go back to the trial court for further hearing, it is unnecessary to mention further points urged by the appellant.

[11] We find nothing in the record which sustains the appellant's contention that the oral testimony introduced tended in any way to controvert any of the written instruments. The fact that Vincent P. Ganahl had made an assignment to the trustee of his interest in the trust estate, as collateral security for the payment of an obligation, did not prevent him from making a subsequent assignment of the same interest. The legal effect, if both instruments were valid, would be that the first assignment would carry sufficient of his interest to discharge the first obligation, and that the second assignment would convey to the assignee named therein the residue of his interest. That each assignment purported to convey the whole interest is wholly immaterial. Being made to secure the payment of money, the instant the obligation was discharged, for the payment of which the assignment was made, all the overplus of the assignor's interest would revert to him and be subject to further disposition.

[12] Evidence that the plaintiff had a judgment against Vincent P. Ganahl we think admissible, not for the purpose of binding the other respondents, but for the purpose of showing, among other things, the insolvency of Vincent P. Ganahl, and the right of the plaintiff to subject the one-tenth interest in the trust estate referred to herein to the payment of the indebtedness of Vincent P. Ganahl to the plaintiff.

[13] We find nothing in the question of estoppel, as it does not sufficiently appear that the plaintiff relied upon or was misled by any statements of any of the officers of the respondent bank.

By reason of the failure to sustain the burden of proof placed upon the respondents by section 2235, supra, and the authorities therein cited, and by reason of what we have hereinbefore set forth, the judgment of the trial court must be, and the same is hereby, reversed, and the cause remanded for further proceedings.

The petition for leave to introduce additional testimony is denied.

We concur: PULLEN, P. J.; THOMPSON, J.

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9 Cal.App.2d 298

KEMP v. CAMPBELL et al.

Civ. 1919.

District Court of Appeal, Fourth District, California.

Sept. 27, 1935.

1. Pleading ⚷34(7)

In suit to foreclose bonds issued under Improvement Act, complaint alleging plaintiff's ownership and possession of bonds which were originally issued to third person *held* sufficient to cure lack of allegation of assignment where no demurrer was interposed at trial and question was raised in appellate court for first time (St. 1911, p. 730, as amended).

2. Appeal and error ⚷909(6)

On appeal on judgment roll from judgment for plaintiff in suit to foreclose bonds issued under Improvement Act, failure to allege assignment of bonds originally issued to third person *held* cured by evidence and waived by defendants, since court was required to presume, in absence of evidence, and in support of judgment, that plaintiff produced evidence of title to bonds at trial (St. 1911, p. 730, as amended).

3. Appeal and error ⚷1071(1)

Absence of findings of fact separate from those in judgment *held* not ground for reversal.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Suit by A. N. Kemp, as receiver of and for the Guaranty Building and Loan Association of Los Angeles, against Audrey Campbell, Adam Layer, and others. Judgment for plaintiff, and the named defendants appeal.

Affirmed.

James R. Jaffray, of Los Angeles, for appellants.

Geo. W. Fenimore, of Los Angeles, and Everett L. Ball, of Hollywood, for respondent.

MARKS, Justice.

This is an appeal from a judgment foreclosing two bonds issued under the Improvement Act of 1911 (St. 1911, p. 730, as amended) on two pieces of property in the city of Oceanside in San Diego county. The case comes before us on the judgment roll.

Appellants urge that the judgment must be reversed because the complaint does not state facts sufficient to state a cause of action against them. No demurrer was interposed to the complaint.

It is alleged that the Guaranty Building & Loan Association of Los Angeles is a corporation; that on December 23, 1930, respondent was appointed receiver of the corporation by the United States District Court for the Southern District of California, and on March 9, 1932, was authorized and permitted to bring this action; that respondent was in possession and control, and entitled to the possession and control of the two street improvement bonds which were set forth in hæc verba and were made payable to the North American Bond & Mortgage Company or its order; that respondent is the owner and holder of the two mentioned bonds. The other allegations of the complaint are not material here. However, it should be noted that there is no allegation of an assignment of either of the two bonds by the North American Bond & Mortgage Company.

[1, 2] Appellants urge that as the complaint shows on its face that the bonds were made payable to the North American Bond & Mortgage Company, and did not allege their assignment, there was no showing of any title in respondent to enable him to foreclose the bonds. Had this been called to the attention of the trial court by timely demurrer, it should have received serious consideration there where the faulty pleading could have been corrected. This was not done.

The complaint alleged that respondent was the owner and holder of the bonds. It is well settled in California that this allegation is sufficient to cure the lack of an allegation of assignment where no demurrer was interposed and the question is raised in the appellate court for the first time. Penrose v. Winter, 135 Cal. 289, 67 P. 772; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 301, 90 P. 203; Smith v. Peters, 46 Cal. App. 47, 188 P. 811; Stevens v. Weisbaum, 87 Cal. App. 664, 262 P. 762.

Another sufficient reason exists for affirming the judgment. The appeal is on the judgment roll alone. In the absence of the evidence, and in support of the judgment, we must presume that respondent produced evidence of his title to the bonds at the trial and that this evidence was received without objection from appellants. With this presumption before us we must conclude that the defect in pleading was cured by the evidence, and that appellants waived the error. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90.

[3] Appellants assert there are no findings of fact to support the judgment. There are no formal separate findings signed by the trial judge. As a part of the judgment, it is found that all the allegations of the complaint are true. Findings of fact separate from those in the judgment are not always necessary and their absence does not in itself furnish a ground for reversal. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517; Shaingold v. Shaingold, 191 Cal. 438, 216 P. 603.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

STAUB v. MULLER (two cases). *

Civ. 5308, 5309.

District Court of Appeal, Third District, California.

Sept. 27, 1935.

Hearing Granted by Supreme Court Nov. 25, 1935.

1. Judgment 🔑314

Judgment inadvertently entered for greater amount than that ascertained from findings of fact could be reduced to conform to fact finding.

2. Trial 🔑404(4)

In actions for destruction of alfalfa by flooding of plaintiff's land, where court adopted general findings to effect that all allegations of complaints were true, but specifically found flooding of plaintiff's land resulted in damage in certain amount to alfalfa crop, defendant could not complain that general finding with respect to damages to freehold was not supported by specific findings.

3. Damages 🔑112

Measure of damages for destruction of alfalfa by flooding *held* local market value of crop less cost of producing and marketing, and not difference between rental value of property with and without destroyed crop.

4. Damages 🔑188(1)

In actions for destruction of alfalfa by flooding of plaintiff's land, evidence *held* sufficient to sustain finding of damages by court.

Appeal from Superior Court, Sutter County; J. O. Moncur, Judge.

Actions by Mary Staub against A. Muller. From judgments for the plaintiff, the defendant appeals.

One judgment affirmed, and other judgment affirmed as modified.

Rich, Weis & Carlin, of Marysville (K. S. Mahon, of Marysville, of counsel), for appellant.

A. B. Reynolds and S. H. Jones, both of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from separate judgments which were rendered against him in two cases which were consolidated for the purpose of trial. Both suits were for damages for the partial destruction of alfalfa by flooding the land of plaintiff. The first case was for the loss of a portion of the crops of 1929 and 1930. The second complaint demands damages for the partial loss of the crop of 1931 from the same cause. Both pleadings asked for general damages to plaintiff's land and also for separate damages for the partial destruction of the alfalfa crops. The appellant contends that the measure of damages which was adopted by the court is erroneous for the reason that it is based on the market value of the crops destroyed, less the cost of production and marketing thereof; that the court failed to specifically find that the damages which were awarded were for the value of the crops as distinguished from the general damages to the premises by virtue of the flooding of the land, and that the findings and judgments are not supported by the evidence.

The plaintiff is the owner of forty acres of farming land in Sutter county, a portion of which has been devoted to the raising of alfalfa since 1926. The defendant owns forty acres of farming land adjacent to the plaintiff's property on the southerly side thereof. A drainage ditch or natural swale extended through both properties from north to south which for many years successfully drained the land of plaintiff. In 1927 the defendant closed the drainage ditch on his premises so as to obstruct and prevent the water which came from plaintiff's property from flowing therein in its natural course. On January 7, 1930, the court rendered judgment in a suit between these parties holding that plaintiff had a vested easement in the drainage ditch which is involved in these suits; that the defendant had wrongfully obstructed the ditch so as to prevent the water from flowing in its natural course therein from plaintiff's property, directing the defendant to forthwith remove all obstructions therefrom and enjoining him from interfering with plaintiff's free use thereof. November 1, 1930, a written stipulation between these parties was executed, authorizing the defendant conditionally to construct and maintain, in lieu of the drainage ditch which had been closed on the property of the defendant, another ditch adequate to serve the purposes of the natural ditch above referred to. This stipulation contained the following proviso: "It is further stipulated that upon the construction of said ditch along the north line of defendant's property in the manner herein prescribed and upon said defendant's providing drainage for the remainder of the distance to Ping Slough herein set forth

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 283.

that the judgment of this court may be modified in accordance with this stipulation, but that this must be done within thirty days from the date of this stipulation or else such stipulation shall be of no force and effect and shall be treated as if it had never been made."

This alternative ditch was not constructed within the time specified, although it was subsequently constructed, but was permitted to be obstructed with vegetation and débris, so that it failed to adequately convey the waters flowing down the natural drainage ditch across defendant's property, and therefore resulted in overflowing some ten acres of plaintiff's alfalfa land so as to partially destroy her crops of alfalfa in the years 1929 to 1931, inclusive. The proceedings of the last-mentioned suit were received in evidence in these cases, for the limited purpose of showing the presence or absence of damages to plaintiff's property by virtue of the overflowing of her land.

These causes were tried by the court sitting without a jury. There is a serious conflict of evidence regarding the damages to plaintiff's property. Similar findings were adopted in both cases. The court found all of the issues in favor of the plaintiff, including the fact that "by reason of said acts of defendant, large quantities of water accumulated upon said lands of plaintiff during the years 1929 and 1930 and in each of said years the alfalfa growing on plaintiff's said lands was injured," and that "by reason of said acts of defendant, plaintiff was damaged in the amount of $250 during the year 1929 and was damaged in the amount of $250 during the year 1930." In the second suit the court found in the identical language above quoted that the plaintiff's alfalfa for the year 1931 was also injured and that she was thereby damaged in the sum of $250. In its conclusions of law in the last-mentioned cause the court inadvertently found that the plaintiff was entitled to judgment against the defendant for the sum of $300 instead of the ascertained sum of $250. Thereupon separate judgments were rendered, in the first case for the sum of $500, and in the second case, which was numbered 3964 in the superior court, for the sum of $300. From these judgments, the defendant has appealed.

[1] While the record contains a conflict, there is ample evidence to support the findings and the judgments in these cases, except, as above pointed out, that there is a variance between the conclusions of law and the findings of fact in one of the cases with respect to the damages to plaintiff's crop sustained in the year 1931. In the last-mentioned case the court specifically found that the damages to plaintiff's crop sustained in the year 1931 was but the sum of $250, and the judgment in that case should therefore be reduced to conform to that finding.

[2] The judgments are not uncertain with respect to the nature of the damages which have been awarded to the plaintiff. It is true that the court adopted general findings to the effect that all of the allegations of the complaints were true, which may be deemed to include the inference as contended by the appellant that the flooding of plaintiff's land resulted in general damages thereto. But the court specifically found that this flooding of plaintiff's land resulted in damage to her growing alfalfa crops for the years 1929 to 1931, inclusive, and that the amount of such damage aggregated the sum of $250 in each of said years. Since the evidence amply supports these findings that plaintiff's alfalfa crops were damaged to that extent in each of the years involved in these suits the defendant may not complain that a general finding with respect to damages to the freehold is not supported by specific findings.

[3] A correct measure of damages was adopted by the court in these cases. It is a well-settled rule of law that the measure of damages for the partial destruction of planted crops as distinguished from natural pasturage is the local market value of the crop less the cost of producing and marketing the same, and not the difference between the rental value of the property with or without the destroyed portion of the crop. Strecker v. Gaul, 35 Cal. App. 619, 170 P. 646; Catlett v. Bennett, 37 Cal. App. 91, 173 P. 598; Miller & Lux, Inc., v. Pinelli, 84 Cal. App. 42, 47, 257 P. 573; 8 Cal. Jur. p. 819, § 76; 4 Sutherland on Damages (3d Ed.) p. 2997, § 1023; section 3333, Civ. Code.

[4] There is ample evidence to sustain the amount of damages awarded to the plaintiff in each of these cases. The evidence clearly shows that this property was normally adapted to produce six crops of alfalfa each season. In 1928 and each season thereafter pending the time involved in this litigation, the plaintiff planted twenty or more acres of her land to alfalfa, and except for the portion thereof which was

damaged or destroyed by the defendant's obstruction of the natural drainage ditch she produced an average of seven tons of alfalfa hay per acre each year. There is substantial evidence to show that some seven to ten acres of this alfalfa were damaged or destroyed in each of the years which are involved herein. There is satisfactory evidence that the market price of alfalfa in that vicinity during these years was from $12.50 to $15 per ton in shocks in the field. The evidence also shows the gross market price of alfalfa in the years of 1929 to 1931, inclusive, and the cost of producing, harvesting, and baling the same. Accepting the minimum number of acres of alfalfa which were damaged or destroyed and the minimum market price which is quoted, it is apparent that the damages awarded by the court are amply supported by the evidence.

The judgment in superior court case No. 3964 involving damages to plaintiff's alfalfa crop for the year 1931 is modified to conform to the finding of fact which was adopted by the court as the sum of $250. As so modified, this judgment is affirmed. The judgment in the other case is affirmed. Respondent will recover costs on each appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

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9 Cal.App.2d 351

Ex parte GALLAGHER.

Cr. 1862.

District Court of Appeal, First District, Division 1, California.

Oct. 7, 1935.

1. Contempt 🔑6

Remark of person who had been summoned before judge that judge's statement that police department was not conducting grand jury investigation was so palpably incorrect that he was surprised that it had been made *held* not contempt of court, where such person was at all times temperate and respectful in his demeanor.

2. Contempt 🔑6

Statement that judge is misinformed as to facts, without more, does not constitute contempt.

Original habeas corpus proceeding by Andrew J. Gallagher.

Petitioner discharged and bail exonerated.

Anthony S. Devoto, C. H. Sooy, and J. H. Sapiro, all of San Francisco, for petitioner.

Joseph T. O'Connor and John R. Tyrell, Deputy Dist. Attys., both of San Francisco, for respondent.

PER CURIAM.

[1, 2] Habeas Corpus. It appears from the record that petitioner was on the 4th day of September, 1935, regularly served with a subpœna to appear before the grand jury of the city and county of San Francisco as a witness in a criminal investigation. On said day and prior thereto said grand jury was engaged in an inquiry into criminal offenses alleged to have been committed by members of the police department, consisting of receiving bribes from proprietors of lotteries, houses of prostitution, and similar unlawful activities. Petitioner, in response to said subpœna, appeared before the grand jury. He was then interrogated as to certain statements he had made which appeared in the public press to the effect that certain police officers were receiving money to permit these evils and violations to continue in the city. He declined to answer any questions on the ground that the police department itself was conducting the examination, and that the inquiry would amount to nothing. On September 19th Hon. Daniel C. Deasy, presiding judge of the superior court, made an order to show cause why he should not be required to answer each and every interrogatory propounded to him by the members of the grand jury, and why he should not be punished for contempt in refusing to answer the same. Petitioner appeared in response to said order in propria persona. The court advised him he would have to answer the questions, and then explained the nature of the inquiry and by whom it was being conducted, the court stating in substance in this regard that, if petitioner's only reason for refusing to testify was based upon the claim, as indicated by a letter written by him, "that an examination by the Grand Jury would be an examination of the Police Department by itself, all I can say is that it is not true. * * *" In response thereto

petitioner replied that, if he was permitted to say anything in his own behalf, the statement by the judge was so palpably incorrect that he was surprised it was made. For this remark he was adjudged guilty of contempt of court and committed to the county jail for a period of five days.

We see nothing in the remark of petitioner that can possibly be construed as a contempt. He appeared in propria persona to the citation, and, if in his opinion the court was in error as to the facts, it surely cannot be held a contempt of court to so inform the court. It is admitted that petitioner was at all times temperate and respectful in his demeanor. To state that a judge is misinformed as to facts, without more, does not constitute a contempt.

The petitioner is discharged and his bail exonerated.

MIX v. INGERSOLL CANDY CO. et al.*

Civ. 1180.

District Court of Appeal, Fourth District, California.

Sept. 27, 1935.

Rehearing Denied Oct. 25, 1935.
Hearing Granted by Supreme Court Nov. 22, 1935.

1. Sales 🔑**274**

Where foodstuffs are delivered by dealer to customer to be consumed away from dealer's premises, he may be held for breach of implied warranty that food is reasonably fit for human consumption.

2. Sales 🔑**274**

Where keeper of restaurant for consideration furnishes meal to customer to be consumed upon premises, "sale" of food served is made with implied warranty that food is reasonably fit for human consumption (Civ. Code, § 1735, as added by St. 1931, p. 2239, § 1).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

3. Sales 🔑**274**

Purchase of chicken pie by customer in restaurant, which customer consumed on premises, *held* to constitute "sale" of pie made with implied warranty that it was reasonably fit for human consumption, since restaurant keeper knew by implication purpose for which pie was required (Civ. Code, § 1735, as added by St. 1931, p. 2239, § 1).

4. Food 🔑**25**

Restaurant keeper has duty to serve his patrons wholesome food fit for human consumption and free from foreign substances that may cause injuries to those consuming it.

5. Food 🔑**25**

In action against restaurant keeper by customer for injuries received from swallowing fragment of chicken bone, allegation in general terms of negligence of restaurant keeper in preparing chicken pie and placing therein sharp fragment of chicken bone which lodged in customer's throat, causing injury, *held* to state cause of action, since negligence of restaurant keeper was necessarily implied from facts alleged.

6. Evidence 🔑**5(1)**

Court could not take judicial notice whether cooking recipes called for presence of bones in chicken pie where court had no knowledge as to such matters, since it could not take judicial notice of what it did not know.

7. Food 🔑**25**

In customer's action against restaurant keeper for injuries received from swallowing chicken bone, court must assume, in absence of contrary pleading or proof, that customer took care to determine that there were no hidden or dangerous substances in that which he consumed (Code Civ. Proc. § 1963).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Harry F. Mix against the Ingersoll Candy Company and another. Judgment for defendants, and plaintiff appeals.

Reversed and remanded, with directions.

Fred A. Steiner and W. W. B. Seymour, both of San Diego, for appellant.

Sanders & Jacques, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after the trial court had sustained a general and special demurrer without leave to amend. The complaint is in two counts, and the sole question necessary for our consideration is whether either or both of these counts state a cause of action.

We may summarize the allegations of the first cause of action as follows: That the Ingersoll Candy Company was and is a corporation, and that at all times mate-

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*For subsequent opinion see 59 P.2d 144.

rial to this action the defendant Beck was its manager, agent, and employee and operated for the corporation a confectionery shop and restaurant for the general public; that on December 17, 1934, plaintiff entered this restaurant, seated himself at a table, purchased and paid for an article of food known as chicken pie; that it was served to him by an employee of defendants and there eaten by plaintiff; that the chicken pie was not fit for human consumption as it contained, concealed therein, a sharp-pointed fragment of chicken bone; that this fact should have been known to defendants; that in eating the chicken pie plaintiff unknowingly swallowed the fragment of chicken bone; that in serving and delivering the chicken pie to plaintiff defendants represented and warranted to him that it was fit and proper for human consumption and free from harmful, dangerous, or injurious substances; that this warranty was breached in the manner already indicated. Plaintiff sought to recover general damages in the sum of $10,000 and special damages for medical and surgical services and hospital treatment and care in the sum of $565.

The facts alleged in the second cause of action closely follow those of the first, except that the allegation that defendants represented and warranted the chicken pie to be fit for human consumption and free from harmful, dangerous, or injurious substances, is omitted and in its place is substituted an allegation in general terms of the negligence of defendants in preparing the chicken pie and placing therein the sharp fragment of chicken bone which lodged in plaintiff's throat and caused his injury and the resulting damage.

It is evident that the first count attempts to state a cause of action for breach of the implied warranty established by the following portion of section 1735 of the Civil Code as enacted in 1931 (St. 1931, p. 2239, § 1): "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

In determining whether the provisions just quoted apply to the facts pleaded in the first cause of action, two principal questions present themselves: (1) Was there a sale of the chicken pie by defendants to plaintiff? (2) Did the plaintiff, by implication (it not being alleged that he expressly did so), make known to the defendants the particular purpose for which the chicken pie was required, and did he rely on their skill and judgment?

In support of the theory that a restaurant keeper does not sell the food which he serves his customer, defendants cite, among others, the following cases: Nisky v. Childs Co., 103 N. J. Law, 464, 135 A. 805, 806, 50 A. L. R. 227; Merrill v. Hodson, 88 Conn. 314, 91 A. 533, L. R. A. 1915B, 481, Ann. Cas. 1916D, 917; Travis v. Louisville & N. R. Co., 183 Ala. 415, 62 So. 851; Roseberry v. Wachter, 3 W. W. Harr. (Del.) 253, 138 A. 273; Kenney v. Wong Len, 81 N. H. 427, 128 A. 343; Bigelow v. Maine Cent. R. Co., 110 Me. 105, 85 A. 396, 43 L. R. A. (N. S.) 627. An examination of these cases will disclose that two of them are actions in tort and not in contract. It must be admitted, however, that there are many other cases supporting the contention of defendants.

The reason for the rule prevailing in those jurisdictions which refuse to recognize the furnishing of a meal to a customer in a restaurant as a sale, is set forth in Nisky v. Childs Co., supra, as follows: "From the earliest times, however, a distinction has been drawn between a sale of an article and the furnishing of food at an eating house, hotel or restaurant; the latter partaking rather of the character of service, in which case the standard of liability is the failure to use that reasonable care which the circumstances require. As was said many years ago in Parker v. Flint, reported in 12 Mod. 1303, 'An innkeeper * * * does not sell but utters his provisions,' and by Professor Beale in his treatise on Innkeepers, § 169, 'As an innkeeper does not lease his room, he does not sell the food he supplies to his guests. It is his duty to supply such food as the guest needs, and the corresponding right of the guest to consume the food he needs and to take no more. Having finished his meal he has no right to take food from the table, even the uneaten portion of the food supplied him. Nor can he claim a certain portion of the food as his own to be handed over to another in case he chooses not to consume it himself.'

"The authorities distinguishing the transaction from a sale recognize that while the food served constitutes, of course, an essential part, yet serving it cannot be regarded as a sale of goods, and this we think the common understanding. A customer at an eating place seeks not to make a purchase but to be served with food to such reasonable extent as his present needs require. With the service go a place, more or less attractive, in which to eat it, a table, dishes, linen, silver, waiters, and sometimes music as an accompaniment, all tending to render more agreeable and palatable that which he eats. The food he obtains is then and there consumed; he does not eat the portion he can comfortably devour and place the remainder in his pockets or other receptacle, to be stored away for future needs. So one who purchases a steamship ticket, or one who registers at a hotel, does not conceive the transaction as a sale of goods when, as part of his passage in the one case, and as a guest in the other, he is supplied with meals; nor does one who enters a restaurant to be supplied with a meal or any portion thereof so regard the supplying of his food. This attitude of the public mind is indicated by the familiar signs, 'Meals served here,' 'Dinners served here,' and the like."

One of the first cases holding that an action on an implied warranty may be maintained against the keeper of a restaurant by a customer who orders a meal for immediate consumption on the premises and finds it unfit for consumption is Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100. That court reached the conclusion that a sale of the food was consummated by the restaurateur, a dealer, and that, under the Massachusetts Sales Act (Stats. 1908, c. 237, § 15 (1), similar to section 1735, Civ. Code of Calif.), there is an implied warranty of the fitness of the food for human consumption. Authorities from many jurisdictions are cited, and the conclusion of the court seems to be based on sound reasoning. To the same effect are Barringer v. Ocean S. S. Co., 240 Mass. 405, 134 N. E. 265, and Smith v. Gerrish, 256 Mass. 183, 152 N. E. 318.

In New York the rule is the same. In Temple v. Keeler, 238 N. Y. 344, 144 N. E. 635, 35 A. L. R. 920, it is said: "We hold that, where a customer enters a restaurant, receives, eats, and pays for food, delivered to him on his order, the transaction is the purchase of goods. We hold also that under such circumstances the buyer does by implication make known to the vendor the particular purpose for which the article is required, and, where the buyer may assume that the vendor has had an opportunity to examine the article sold, it appears conclusively that he relies upon the latter's skill or judgment. Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471. Consequently there is an implied warranty that the food is reasonably fit for consumption." See, also, Race v. Krum, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F, 1172; Muller v. Childs Co., 185 App. Div. 881, 171 N. Y. S. 541, and Barrington v. Hotel Astor, 184 App. Div. 317, 171 N. Y. S. 840. The same rule prevails in Illinois, Greenwood v. John R. Thompson Co., 213 Ill. App. 371; in Missouri, Smith v. Carlos (Mo. App.) 247 S. W. 468; and in Indiana, Heise v. Gillette, 83 Ind. App. 551, 149 N. E. 182.

It has been held that serving certain articles of prohibited food or drink by a hotel or restaurant keeper to his guest as a part of a meal constitutes a sale. Intoxicating liquors, Commonwealth v. Worcester, 126 Mass. 256; State v. Lotti, 72 Vt. 115, 47 A. 392; poor quality milk, Commonwealth v. Warren, 160 Mass. 533, 36 N. E. 308; partridges out of season, People v. Clair, 221 N. Y. 108, 116 N. E. 868, L. R. A. 1917F, 766; quail, Commonwealth v. Phœnix Hotel Co., 157 Ky. 180, 162 S. W. 823; oleomargarine, Commonwealth v. Miller, 131 Pa. 118, 18 A. 938, 6 L. R. A. 633. Similar illustrations might be continued, but the foregoing sufficiently illustrate the point. If the delivery to a customer of certain articles of food or drink for immediate consumption as a part of a meal constitutes a sale of such articles, it is difficult to understand why the delivery of all of the articles of food and drink constituting a meal is not a sale.

Defendants maintain that it has been held and is the established law in California that when the owner of a restaurant furnishes food to a customer for a consideration he does not sell the food but merely furnishes service of which the food is a part. They cite Loucks v. Morley, 39 Cal. App. 570, 179 P. 529, 533, and Stell v. Townsends, etc., Inc., 138 Cal. App. (Supp.) 777, 28 P.(2d) 1077, in support of this contention.

In the main opinion in Loucks v. Morley, supra, written by Mr. Justice Thomas, the foregoing rule is stated. But it should be observed that the two associates of the learned author of the opinion only concurred in the judgment and clearly stated their reasons for so doing as follows: "We concur in the judgment for the reason that, in the absence of any showing of negligence, the only ground upon which defendant can possibly be held liable is that of an implied warranty of the purity and quality of the food dispensed by it. The only implied warranty that might be invoked as applicable to the transaction, under the law of California, is that declared in section 1775 of the Civil Code, which applies alone to 'one who makes a business of selling provisions for domestic use.' The complaint does not allege, and the facts do not show, that the defendant was engaged in the business of selling provisions for 'domestic use,' or that the transaction in question was a sale for 'domestic use.' The defendant is a restaurant keeper who dispenses food to be consumed by customers in his place of business, and such was the transaction here complained of. Under a strict and accurate definition, the term 'domestic use' does not apply to such sales." In the main opinion Mr. Justice Thomas reached the same conclusion for the reason that "domestic use" must be construed as use in the home. This single ground furnishes an ample and sound reason for the judgment of the court. As the opinion of the two justices concurring in the judgment set forth their reasons for so doing, this had the effect of withholding their approval to the other reasons for the affirmance of the judgment as set forth in the main opinion. Therefore, the argument of Mr. Justice Thomas that a restaurant owner does not sell the food comprising a meal consumed on the premises becomes, not only dicta, but the mere personal opinion of that eminent jurist in which his two colleagues declined to concur. Therefore, and for the further reason that section 1775 of the Civil Code was repealed (St. 1931, p. 2234) before the cause of action in the instant case arose, the portion of the opinion relied upon by defendants can have no controlling weight here.

The case of Stell v. Townsends, etc., Inc., supra, was decided by the appellate department of the superior court of the city and county of San Francisco. The action was in tort to recover damages suffered by plaintiff by reason of unwholesome food served her in the restaurant of defendant and consumed there. The appeal was from a judgment entered after the trial court granted defendant's motion for nonsuit. We agree with that court on the negligence phase of the case and believe the judgment was properly reversed. However, that court proceeded to consider the question of an implied warranty and reached the conclusion that the rule in this state is that "one serving food to be immediately consumed on the premises is not an insurer of the fitness or wholesomeness of the food served, nor is he chargeable with an implied covenant of warranty." This conclusion was reached on what was said by Mr. Justice Thomas in the case of Loucks v. Morley, supra, but which was not concurred in by two of the justices of the District Court of Appeal. It is evident that the conclusion in the Stell Case is dicta and is not supported by the holding of a majority of the members of the court in the Loucks Case.

The remaining California case to which our attention has been called as bearing on the subject we are considering is San Francisco v. Larsen, 165 Cal. 179, 131 P. 366, 367. That action was for the recovery of a license tax imposed on defendant under an ordinance. The city charter then in effect exempted from paying a license tax "any person who at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise." The Supreme Court said: "When we speak of a place where the business of selling or manufacturing goods, wares, or merchandise is carried on, we do not usually think of restaurants in that connection. One who mixes and cooks foodstuffs is engaged in the business of manufacturing goods, if we use the words according to their literal meaning, but, if we mention manufacturers, we should scarcely expect to be understood to refer to the keepers of restaurants. A restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer. The fact is that both the sale and the manufacture of food are mere minor incidents to the keeping of a restaurant. A restaurant is, primarily, a public eating place. It is not, primarily, or according to the ordinary habit of speech, a place where the business of manufacturing or selling goods, wares, or merchandise is carried on." While the Supreme Court reached the conclusion that the place of business of a restaurant keeper was not exempt from the levy of a license tax under the charter provisions, it made the following pertinent remarks: "It cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum, with the charge for service and use of dishes, chair, and table. It is nevertheless a sale of the food consumed, within the technical definition of that term."

[1] It is held without important exception that where foodstuffs are delivered by a dealer to a customer to be consumed away from the dealer's premises he may be held for a breach of an implied warranty that the food is reasonably fit for human consumption. It has also been held that one who consumes a dish of ice cream at a fountain may hold the proprietor for damages if it is unfit for human consumption. Numerous cases hold that if the same kind of ice cream is consumed as a part of a meal no recovery can be had. In his dissenting opinion in the case of Lynch v. Hotel Bond Co., 117 Conn. 128, 167 A. 99, 101, in discussing such a situation, Mr. Justice Haines made the following pertinent remarks: "It would seem that the reason for the ancient rule has passed with the conditions which brought it into existence. The citizen may well wonder at the intricacies of the law when told that he is protected in the purchase of ice cream at a drug store which he consumes upon the premises, using the facilities there provided, but may be poisoned and denied a remedy when he does exactly the same thing in a restaurant. He has just cause for doubting that 'law is founded on reason.'"

[2, 3] We are of the opinion that the more logical rule governing this case and which should be adopted in California is that where the keeper of a restaurant, for a consideration, furnishes a meal to a customer to be consumed upon the premises, a sale of the food served is made and, under the provisions of section 1735 of the Civil Code which we have quoted, there is an implied warranty that the food is reasonably fit for human consumption. That the plaintiff made known to defendants, by implication, the purpose for which the chicken pie was required and that he relied upon their skill or judgment in preparing it, cannot be denied. In the recent case of Gindraux v. Maurice Mercantile Co. (Cal. Sup.) 47 P.(2d) 708, it was said: "The sale of the salami was made in the ordinary course of trade and business by a dealer in foodstuffs to the plaintiff for human consumption. The defendant therefore knew by implication the particular purpose for which the salami was required. From that fact there arose an implied warranty that the commodity was reasonably fit for such purpose. Civ. Code, § 1735, subd. 1; Consolidated Pipe Co. v. Gunn, 140 Cal. App. 412, 415, 35 P.(2d) 350."

Defendants urge many other reasons why the first count does not state facts sufficient to constitute a cause of action against them. We have studied them all and do not consider it necessary to discuss any of them except one which properly falls under the second cause of action.

The second cause of action pleads negligence in general terms. This is all that is required under the law of this state. While it is not specifically alleged that the injuries of plaintiff were proximately caused by the negligence of defendants, this is necessarily implied from the facts alleged.

In Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001, 1002, 1 Ann. Cas. 206, it is said: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure."

[4-5] When measured by this test, we are of the opinion that the second cause of action is a sufficient pleading. It cannot be doubted that a duty rests upon a keeper of a restaurant to serve his patrons wholesome food fit for human consumption and free from foreign substances that may cause injury to those consuming it. Stell v. Townsends, etc., Inc., 138 Cal. App.

(Supp.) 777, 28 P.(2d) 1077, and cases cited. We have been cited to no cases to the contrary and defendants do not dispute the correctness of this rule. The failure to discharge this duty is sufficiently alleged or necessarily implied from the alleged facts. The resulting injury and damages sustained are also sufficiently alleged.

Defendants attack both causes of action upon grounds set forth in a portion of the opinion of the trial court which they quote as follows: "My stand has been definitely made in defense of the 'chicken pie', that it is a dish served with chicken bones, and that it is not negligence to serve it with chicken bones any more than it would be to serve beef stew with beef bones. A bone is an incident to the serving of most meats. The liability depends not upon the service under such circumstances, but the case turns upon the negligence in the consumer."

[6] Defendants maintain that we must take judicial notice that chicken pie contains chicken bones; that one eating a chicken pie must be held to know that it contains chicken bones and therefore must assume the risk of injury from a chicken bone; that it is contributory negligence for one to swallow a mouthful of chicken pie without first determining that it is free from dangerous slivers of chicken bone.

The writer of this opinion has partaken of chicken pie for upwards of fifty years. He has many times partaken of that succulent product of culinary perfection when no bones at all were encased within its crusts. Whether the presence of chicken bones in chicken pies is demanded by the recipes of the cookbooks I do not know. Of that of which I know nothing, I cannot take judicial notice. Bates v. Escondido Union High School District, 133 Cal. App. 725, 24 P.(2d) 884.

If we assume that the text and authority which govern the master of the kitchen require that he retain within the chicken pie the chicken bone, still we cannot assume that custom, rule, or duty requires him to have so well concealed within the chicken's meat a fragment of bone so sharp and jagged and detached from the original members that it would slip unknown into the throat of the unsuspecting consumer and there bury itself in those tender tissues to cause pain and suffering and damage of great degree.

[7] It is presumed "that a person takes ordinary care of his own concerns." Section 1963, Code Civ. Proc. It is therefore the duty of a court, in the absence of contrary pleading or proof, to assume that the consumer of a chicken pie took care to determine that there were no hidden and dangerous substances in that which he consumed; that he sufficiently masticated each mouthful of the food to satisfy himself as an ordinarily prudent person would do that it was safe to let it enter the inner orifices of his body. We cannot presume the plaintiff guilty of contributory negligence without the support of either pleading or proof.

The liability of defendant Beck under either or both of the counts, as distinguished from the liability of the defendant Ingersoll Candy Company, has not been considered in the briefs and seemingly was not presented to the trial court. This question has not been considered by us and should it be presented at a future time in a proper manner, nothing we have said should be construed as bearing on that question.

The judgment is reversed, with directions to the trial court to overrule the demurrer of defendants and permit them to answer within reasonable time.

We concur: BARNARD, P. J.; JENNINGS, J.

9 Cal.App.2d 327

MOUNTS v. TZUGARES et al.

Civ. 9657.

District Court of Appeal, First District,
Division 2, California.
Oct. 4, 1935.

Rehearing Denied Nov. 2, 1935.

Hearing Denied by Supreme Court
Dec. 2, 1935.

1. Automobiles 🔑201(5)

In motorist's action for injuries sustained in collision with approaching truck, owner and driver of truck, which was parked near scene of collision with four wheels on pavement, were negligent, although such negligence was not proximate cause of collision, where approaching truck could have passed parked truck without encroaching into motorist's lane of traffic (Gen. Laws 1931, Act 5128, § 136).

2. Automobiles 🔑206

Motorist must at all times use due care to avoid collision and he must be alert and watchful, so as not to place himself in danger, and, while he can assume that others will exercise due care, he cannot for that reason omit any of care which law demands of him.

3. Appeal and error 🔑1002

Contributory negligence of motorist would not be reviewed by District Court of Appeal where question had been passed on by jury as matter of fact and evidence was conflicting.

4. Appeal and error 🔑1047(1)

In motorist's action for injuries sustained in collision, that physician testifying for motorist showed injury to motorist's arm to jury after counsel for some of defendants had offered to stipulate that medical evidence was not being questioned *held* not prejudicial.

5. Appeal and error 🔑1053(2)

In motorist's action for injuries sustained in collision, admission of testimony that physician had been authorized by attorney for some of defendants to examine motorist and that report, which was not offered in evidence, had been made by physician *held* not prejudicial where court admonished jury to disregard testimony and to draw no presumption therefrom.

6. Damages 🔑132(8)

$28,000 verdict in favor of motorist injured in collision who had life expectancy of 14.74 years and who had been active, robust man engaged in active business with monthly salary of $315 and who sustained shattered and useless arm, five broken ribs, and two fractures of one shoulder blade, and who developed traumatic pneumonia and severe infection of arm wounds, and who was totally and permanently disabled and unable to engage in any business, *held* not excessive.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by George Franklin Mounts against George Tzugares and others. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed as against some of the defendants, and reversed as against other defendants.

Decoto & St. Sure, of Oakland, for appellants Mardesich and Rice.

Weinmann, Quayle & Berry, of Oakland, for appellants Tzugares and Angelakis.

Clifton Hildebrand and Goodman, Bachrack & Brownstone, all of San Francisco, for respondent.

STURTEVANT, Justice.

In an action brought to recover damages for personal injuries sustained in an automobile collision, the jury returned a verdict awarding the plaintiff $28,000. From the judgment entered thereon, the defendants have appealed.

The accident occurred on January 11, 1934, at about 4 o'clock in the afternoon. It was a clear day, and the road and pavement were dry. The accident occurred on the road leading from Oakland to Stockton at a point about three-quarters of a mile beyond the town of Livermore. At that point a house known as the Schenoni residence stands on the north side of the highway and closely adjacent. West of that house the highway extends along a straight line for some distance. Commencing near the westerly end of the house the highway curves slightly toward the north. Generally speaking the highway pavement is 37 feet wide as the road approaches from the west. However, at a point where the curve commences the road is widened on each side, and, at the focal point of the accident, the pavement is 43 feet wide. A white strip four inches wide extends along the middle dividing the highway into two lanes. In the form of a crescent a side road commences at the highway, leads toward the house and then swings back into the highway. A short time before the accident a 1½ ton Ford truck owned by the defendant Tzugares and operated by the defendant Angelakis was driving west on the highway. Tire trouble occurred and Angelakis stopped his truck approximately in front of the house. There was evidence that it was so stopped with all four wheels on the pavement. Angelakis alighted and proceeded to change tires and was in the act of replacing the extra at the rear end of his truck. At about that time a truck and trailer owned by the defendant Mardesich, operated by defendant C. D. Rice, and having a load of box shook, approached from the east. The truck and trailer were about 45 feet long, 7½ feet wide, and the gross weight of the load, truck, and trailer was about 25 tons. From the west two automobiles approached. One, a Chrysler, six feet wide, was being operated by the plaintiff, Mounts; the other one, which for th purposes of this decision we will call the "X" car, was operated by some other person, whose name the record does not disclose. At a point 200 feet west of the impact the X car was proceeding along the southerly edge of the pavement at a speed of approximately 40 miles an hour. The plaintiff, Mounts, had been driving 45 miles an hour and on overtaking the X car he turned to the left, drove forward until he was about opposite the rear wheels of the X car, and reduced his speed to 35 or 40 miles an hour. At the time Mounts overtook the X car he had a view of the highway 500 feet ahead. He saw the Ford truck and that it was at a standstill. The Chrysler car with the X car on its right proceeded at 35 or 40 miles an hour. When about 75 feet west of the parked truck, Mounts testified he saw the truck and trailer for the first time. At that time the truck and trailer were about 75 feet east of the parked truck. The truck and trailer turned to the left to pass the Ford truck and at that time were traveling about 20 miles an hour. The Chrysler and X car continued forward at 35 or 40 miles an hour. At a point a short distance west of the front end of the Ford truck the left side of the Chrysler collided with the left side of the truck and trailer.

[1] The defendants Tzugares and Angelakis contend they were not guilty of negligence and they claim that the Ford truck was parked with all four wheels north of the highway. On that subject the evidence is directly conflicting. If the jury believed the testimony of witnesses called by the plaintiff, and from its verdict we must assume it did, then the jury could find that the Ford truck was parked with all four wheels on the pavement. If it was so parked that was an act in violation of the terms of the California Vehicle Act (St. 1923, P. 517, as amended, 2 Deering's Gen. Laws, Act 5128, p. 2451, § 136). It is not even contended that the Ford truck was moved before the collision. The negligence of these defendants was therefore a continuing act, and their claim that they were not negligent may not be sustained.

Not waiving other points made by them, these defendants contend that their said acts, negligent or not negligent, were in no manner the proximate or any cause of the accident. McMillan v. Thompson, 140 Cal. App. 437, 35 P.(2d) 419. They contend that the truck and trailer had a safe margin to pass the parked truck in the north lane without encroaching on the south lane to any extent whatever. The plaintiff produced a diagram prepared by an engineer. It is drawn to scale and shows the highway for a distance of 240 feet both east and west of the middle line of the Schenoni house if extended. The defendants produced a similar diagram. The curve hereinabove mentioned is very slight—1 per cent. or thereabout—and commences at approximately the point of the collision. The pavement, at the point where the plaintiff claimed the collision occurred is 43 feet wide and the Ford truck 6½ feet wide was parked according to the contention of the plaintiff's witness six inches from the outside edge of the pavement. Six inches plus 6½ feet are seven feet. The north lane was 21½ feet wide. There was, therefore, a space of 14½ feet, practically straight, between the parked truck and the white line in the middle of the highway. The truck and trailer were 7½ feet wide. It does not appear that under the facts as recited the position of the Ford truck forced the truck and trailer into the south lane or in any manner contributed toward the accident. The burden rested on the plaintiff and he did not sustain it as to these defendants.

The defendants Rice and Mardesich claim they were not negligent. In that connection they contend the truck and trailer at no time crossed the white line. As to whether it did or not, the evidence was conflicting. There was evidence to the effect that immediately before the collision the left side of the front of the truck was a foot and a half, or more, over the south side of the white line. When the collision occurred, the left front wheel of the truck was broken off. Thereupon the truck skidded forward, making prominent marks on the surface of the highway south of the white line. Those physical facts are also opposed to the contention of these defendants and support the verdict of the jury.

All of the defendants contend the plaintiff was guilty of contributory negligence as a matter of law. Many different theories are advanced. The defendants Tzugares and

Angelakis call our attention to the parts of the record showing: That when 200 feet west of the point of collision the plaintiff had a clear view of the highway for a distance 300 to 500 feet east of said point; that he then pulled out from the south edge of the pavement for the purpose of overtaking and passing the X car and to assume a position on the highway to the left of that car; that as he did so he saw the parked truck on the highway and decided to defer passing the X car until a point beyond the parked truck was reached; that when 75 feet west of the point of collision the plaintiff saw the truck and trailer attempting to pass the parked truck; and that from the time he saw the parked truck until the collision with the truck and trailer it was inevitable that if plaintiff maintained the same relative position on the highway—to the left and abreast of the X car—a collision would occur. The defendants then assert that plaintiff violated section 122 (b) of the California Vehicle Act, supra, but there was no evidence that before attempting to pass the X car the plaintiff did not drive as closely as practicable to the right edge or curb of the highway. It is next asserted that plaintiff violated section 124(a). But there is no evidence that the plaintiff attempted to do otherwise than to drive to the right of the truck and trailer, giving to them at least one-half of the main traveled portion of the highway. Again it is contended that the plaintiff violated section 127(a), but there is no evidence that the plaintiff followed the X car. He drove by its side. The highway was 43 feet wide. His half was 21 feet, and the statute contains no provision precluding the plaintiff and the X car from traveling side by side so long as they remained in their half of the traveled portion of the highway.

[2, 3] The other defendants rely on and quote from Donat v. Dillon, 192 Cal. 426, at page 429, 221 P. 193, 194, where the court says: "A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him." There is no question but that the rule as there stated is correct. In arguing contributory negligence to the jury as a matter of fact, no doubt counsel earnestly pressed the rule. But contributory negligence as a matter of fact was passed on by the jury, and, as the evidence was conflicting, no such question is before this court for review.

[4] The next point is that the defendants Tzugares and Angelakis claim that plaintiff's counsel was guilty of prejudicial misconduct. Two separate acts are stated. When Dr. Barnard, a witness called for the plaintiff, was being examined, the plaintiff's attorney asked him to show the jury the injury the plaintiff had suffered regarding his arm. Thereupon one of the attorneys for these defendants stated that he was defending on nonliability for the accident. However, he did not interpose a formal objection. Plaintiff's attorney then stated, "Go ahead, Doctor." The doctor did so and partly removed bandages and exposed the arm of the plaintiff to the jury. No objection was made except as stated. Under these circumstances, we think the record does not support the contention. In his complaint, the plaintiff had alleged his injuries. Those allegations had been denied by all of the defendants. These defendants did not amend their answer nor withdraw their denials. The other defendants did not participate by interposing an objection or offering a stipulation. Because counsel for these defendants in effect offered to stipulate that he was not questioning the medical evidence, did not alter the right of the plaintiff to prove his case as against the other defendants.

[5] The other incident on which it is claimed there was misconduct brings up the following facts. After all of the evidence had been introduced, the trial court directed counsel to proceed with their arguments. Thereupon the following proceedings were had:

"Mr. Hildebrand (attorney for plaintiff): Gentlemen, may we stipulate that at your request Dr. Eaves and Dr. Holcomb examined the plaintiff?

"Mr. Weinmann: No such stipulation from me."

Thereupon, over the objection and exception of the defendants, Mr. Berry was called as a witness and testified that when Mr. Weinmann was absent in Oregon the witness authorized Dr. Eaves to examine the plaintiff and later Dr. Eaves did so and made a report. The report was not offered in evidence by anybody. The record does not show what the report contained. Still later, without the presence of the jury and after argument had, the court ordered the testimony given by Mr. Berry and any stipulations made as to the absence of Doctors Eaves and Holcomb be stricken out. Still later the trial court fully admonished the jury to disregard the testimony and to draw no presumption therefrom. We see no prejudicial error regarding either of the assignments.

[6] These defendants contend that the verdict, $28,000, was excessive. The contention may not be sustained. At the time the plaintiff was injured his expectancy was 14.74 years. He was an active officer of the Brotherhood of Railroad Carmen and was receiving a monthly salary of $315. Prior to the accident he was an active, robust man engaged in active business. Subsequent to the accident he had a shattered and useless arm, and five broken ribs, and two fractures of one shoulder blade. He developed traumatic pneumonia and a severe infection of the wounds in his arm. He is completely and totally and permanently disabled and unable to engage in any business. After the accident happened, he incurred special damages in the sum of $2,344.20. Under these circumstances, we think it is clear it may not be said the verdict returned by the jury was the result of passion, prejudice, or corruption on the part of the jury.

The judgment is affirmed against the defendants Mardesich and Rice, but as to the defendants Tzugares and Angelakis it is reversed, and they will recover their costs on appeal.

We concur: NOURSE, P. J.; SPENCE, J.

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9 Cal.App.2d 324

LIEB v. LAGER et al.

Civ. 9156.

District Court of Appeal, First District, Division 1, California.

Oct. 3, 1935.

1. Dismissal and nonsuit ⇨60(1)

Court may in exercise of wise discretion dismiss case when delay in service is for period shorter than that named in statute (Code Civ. Proc. § 581a).

2. Dismissal and nonsuit ⇨60(1)

Whether plaintiff has discharged duty of diligent prosecution of his case to final determination is question largely committed to discretion of trial court (Code Civ. Proc. § 581a).

3. Dismissal and nonsuit ⇨60(1)

Only limitation upon exercise of discretionary power to dismiss cause for delay in service of summons is that it must not be abused (Code Civ. Proc. § 581a).

4. Appeal and error ⇨973

Where motion to dismiss action for want of diligence in prosecution thereof was heard upon conflicting affidavits, appellate court must assume that lower court found facts to be as asserted by moving and prevailing party (Code Civ. Proc. § 581a).

5. Dismissal and nonsuit ⇨60(1)

Court *held* not to have abused discretion in granting motion to dismiss action for want of diligence in prosecution thereof where summons was served two years and three months after filing of complaint, and evidence was conflicting as to whether service was delayed in anticipation of possible settlement, although no actual prejudice to defendants had been shown (Code Civ. Proc. § 581a).

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by C. D. Lieb, doing business under the firm name and style of Eagle Electric Company against M. Lager and another doing business under the firm name and style of Lager & Val Franz. Judgment for defendants, and plaintiff appeals.

Affirmed.

Oliver Dibble, of San Francisco, for appellant.

Abraham M. Dresow, of San Francisco, for respondents.

TYLER, Presiding Justice.

Dismissal of action for lack of diligence in the prosecution thereof. Plaintiff sued the defendants upon an open book account and upon an account stated. The complaint was filed and summons issued thereon on October 29, 1930. No further action was taken by plaintiff until January 30, 1933, a period of some two years and three months thereafter, when one of the defendants was served with complaint and summons. Thereupon both defendants made a motion to dismiss. The motion was heard upon affidavits. The affidavits of defendants show that they were available and accessible at all times subsequent to the filing of the complaint and could have been served. This fact was not denied by plaintiff. The affidavit of plaintiff in opposition to the motion sets forth that within two months after the filing of the complaint he met defendant Lager and at said time the subject-matter of plaintiff's demand was discussed and plaintiff advised this defendant that he had sued on the account; that Lager then stated he would see his partner and suggested that plaintiff take no further steps or incur further expense in the prosecution of said action pending a possible adjustment thereof. Plaintiff's affidavit further stated that on different occasions thereafter similar statements were made by Lager to plaintiff, without results, until finally plaintiff caused the complaint and summons to be served. Defendant Lager filed a counteraffidavit in which he denied that he had ever engaged in the conversations set forth in plaintiff's affidavit. The court granted the motion to dismiss the action for want of diligence in the prosecution thereof and gave judgment for defendants. Plaintiff appeals from the order of dismissal and from the judgment based thereon.

[1-5] Section 581a of the Code of Civil Procedure makes provision for mandatory dismissal of an action where summons is not served within three years. It is conceded, however, as indeed it must be, that courts may, in the exercise of a wise discretion, dismiss a case when the delay in service is for a period shorter than that named in the statute. 9 Cal. Jur., p. 536. It is appellant's contention, however, that where nothing more than the mere lapse of time is brought to the attention of the court —where no facts are established to show any prejudice resulting from the delay in serving summons—and the delay is less than three years, it is an abuse of power to dismiss an action; that in order to exercise discretion some facts other than the mere lapse of time must be addressed and presented to the court in order to enable it to exercise discretion, otherwise the arbitrary policy of the law as expressed by section 581a must govern, and only in cases where the delay is for three years or more can an order of dismissal be made. As above indicated, it is an inherent right, and therefore one existing independent of any statute, to dismiss a suit for a failure to prosecute it with due diligence. Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213; Raggio v. Southern Pacific Co., 181 Cal. 472, 185 P. 171. As has frequently been said, the duty rests upon a plaintiff at every stage of the proceedings to use diligence to expedite his case to a final determination that there may be an end to litigation. The question of diligent prosecution is one largely committed to the discretion of the lower court. Ferris v. Wood, 144 Cal. 426, 77 P. 1037. The only limitation upon the exercise of the discretionary power of the court to dismiss a cause for delay in the service of summons is that it must not be abused. Kreiss v. Hotaling, 99 Cal. 383, 33 P. 1125. Here the motion was heard upon conflicting affidavits and it must be assumed that the court below found the facts to be as asserted by the moving and prevailing party. Witter v. Phelps, 163 Cal. 655, 126 P. 593. The argument that the discretion is controlled by section 581a of the Code of Civil Procedure where no actual prejudice is shown is without merit. Even if it be assumed that the delay here involved did not injure the defendants, it is no excuse in itself for the tardy service, and this fact in no manner controlled the action of the court in the exercise of its discretion. Anderson v. Nawa, 25 Cal. App. 151, 143 P. 555. To say that the court is so limited is to deny its exercise of discretionary power in all cases. As we have seen, the only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. Clavey v. Lord, 87 Cal. 413, 419, 25 P. 493. From the facts before us, we cannot say that the court abused its discretion.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

9 Cal.App.2d 317

PEOPLE v. GROVES.

Cr. 2704.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1935.

Rehearing Denied Oct. 17, 1935.

Hearing Denied by Supreme Court Oct. 31, 1935.

1. Homicide 🔑254

Evidence *held* sufficient to support conviction of second-degree murder.

2. Criminal law 🔑834(2)

Where court carefully and adequately instructed jury upon every theory advanced by defendant in homicide prosecution, defendant could not complain because law was not given to jury in exact phraseology which he preferred.

3. Criminal law 🔑1186(4)

Appellate court would not reverse conviction for erroneous exclusion and admission of testimony which were of small consequence in extended trial and which resulted in no miscarriage of justice, such as would entitle defendant to new trial (Const. art. 6, § 4½).

4. Criminal law 🔑823(12)

In trial of insanity issue in homicide prosecution, inclusion of statement that "if you are satisfied by preponderance that defendant is sane or insane," in first part of instruction relating to degree of proof required with reference to direct and circumstantial evidence, *held* not error where correct law as to preponderance of evidence was fully and accurately stated elsewhere.

5. Criminal law 🔑829(1)

In homicide prosecution, instructions which were either fully covered by other instructions or were not correct statements of law *held* properly refused.

6. Constitutional law 🔑250, 268

Statutes relating to pleas of not guilty by reason of insanity and trial thereon *held* not to deny due process or equal protection of law (Pen. Code, §§ 1016, 1026; Const. U. S. Amend. 14).

◆

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Francis Raymond Groves was convicted of second-degree murder, and he appeals. Affirmed.

Richard H. Cantillon, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIG, Presiding Justice.

The defendant was charged with the murder of his wife and entered a plea of "not guilty" and "not guilty by reason of insanity." On the plea of "not guilty" he was tried by a jury which returned a verdict of guilty of murder in the first degree with the recommendation of life imprisonment, and subsequently on the plea of "not guilty by reason of insanity" the same jury returned a finding that the appellant was sane at the time the crime was committed. Upon the hearing of the motion for a new trial, the trial court reduced the offense to murder in the second degree. This appeal is from the judgment of conviction and from the order denying the motion for a new trial. It was the theory of the defendant on his defense of "not guilty" that the shooting was accidental, but unfortunately for this theory the deceased was shot not once but twice, and a moment after the shooting the defendant was found unconscious lying face down across the lap of the deceased with a bullet wound in the mastoid bone of his head. No powder burns were found around the wounds of the deceased. Threatening remarks had been made previously by defendant to deceased. The jury did not believe defendant's story that the shooting of the deceased was unintentional and a result of accident or misfortune.

[1] The primary point upon which the defendant relies and the one upon which he places the greatest emphasis is insufficiency of the evidence under the plea of "not guilty." The briefs are voluminous and the record is long, and we have given them careful consideration. It is sufficient to say with regard to this contention that there is substantial evidence to sustain the verdict. It would serve no useful purpose to set out the facts and circumstances in evidence upon which this statement is based. Koeberle v. Hotchkiss (Cal. App.) 48 P. (2d) 104.

[2] The defendant contends that the court erred in refusing to give two instructions on the subject of accidental death which were offered by the defendant, and contends also that no instructions were given to the jury on the subject-matter contained in them. In this the appellant is in error. Indeed, the court carefully and adequately instructed the jury upon every theory advanced by the defendant in the

trial. The defendant cannot complain merely because the law was not given to the jury in the exact phraseology which he preferred.

[3] The defendant next contends that the trial court erred in excluding certain testimony of a physician and in admitting other testimony. Assuming that these two rulings were erroneous, which we do not find, nevertheless they are of small consequence in the extended trial and there was no miscarriage of justice resulting from these rulings such as would entitle defendant to a new trial under section 4½, article 6, of the Constitution.

[4, 5] The defendant next contends that an instruction given by the court in the trial of the insanity issue on the subject of direct and circumstantial evidence was erroneous. The first part of the first sentence in the instruction was somewhat clumsy in the use of the phrase "if you are satisfied by a preponderance that defendant is either sane or that he is insane." However, the instruction was not on that subject, but upon the familiar rule that the law makes no distinction between direct evidence and circumstantial evidence in the degree of proof required. The instruction was not a formula instruction. The correct law as to preponderance of evidence was fully and accurately stated elsewhere and obviously the phrase did not result in a miscarriage of justice. The defendant also complains because other instructions offered by the defendant were refused. These instructions were in each instance either fully covered by other instructions or were not correct statements of the law.

[6] The defendant finally contends that the court erred in overruling defendant's objection to the imposition of sentence on the ground that sections 1016 and 1026 of the Penal Code, which governed the conduct of the trial, were repugnant to and in contravention of the Fourteenth Amendment of the Federal Constitution in that they denied to the defendant due process of law and equal protection under the law. The Supreme Court has already decided this question adversely to appellant's contention. People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

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9 Cal.App.2d 335

PEOPLE v. LOONEY et al.

Cr. 2731.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1935.

Hearing Denied by Supreme Court Oct. 31, 1935.

1. Criminal law ⚷511(2)

Connection of accused with crime need not be established beyond reasonable doubt by evidence other than testimony of accomplices and corroborative testimony need only tend to connect accused with crime charged.

2. Criminal law ⚷641(1)

Accused has constitutional right to appear and defend, in person, criminal prosecution against him.

3. Criminal law ⚷596(2), 598(7)

In robbery prosecution, court properly refused request of accused for delay for purposes of producing witnesses, where testimony of one witness would only have corroborated that of accused on matter collateral to issue, and neither witness had been subpœnaed, though one had been in attendance at court.

4. Criminal law ⚷1144(10)

Where argument of accused who made his own plea to jury was not before appellate court, fact that court told accused he could not talk about his own testimony *held* not error, since presumption was that accused told jury whatever he thought might help him.

5. Criminal law ⚷1165(1)

Where record leaves no reasonable doubt that accused was guilty of crime charged, in absence of clear showing of prejudice, appellate court will not order reversal.

6. Criminal law ⚷894

Motion to set aside verdict of guilty and dismiss cause is not authorized.

7. Criminal law ⚷1184

Appellate court refused to reduce offense of which accused was convicted from robbery to grand theft, although trial court reduced offense as to another defendant.

8. Criminal law ⚷998

Where defendant was given trial on merits, trial court did not err in refusing motion to vacate judgment and hear evidence on matter of probation.

◆

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Vernon Looney and others were convicted of robbery in the first degree, and

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

defendants Dennis La Caster and Merle C. Nunn appeal.

Judgment affirmed.

Henry G. Bodkin, of Los Angeles, for appellant La Caster.

John S. Cooper, of Los Angeles, for appellant Nunn.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendants and three others not herein named were jointly charged, tried, and convicted of robbery of the first degree. Defendants La Caster and Nunn have appealed and their appeals have been presented separately.

From the record it appears that on Thanksgiving Eve of 1933 the five defendants met at a bootleg establishment conducted by defendant Nunn and agreed upon the robbery. They thought that the complaining witness was operating a still and that he had considerable brandy and wine on his premises. Defendant La Caster was to pose as a federal officer, and they thought that in this way there would be no trouble getting the liquor from the complaining witness for the reason that he would be scared to death. The five conspirators arrived at the premises of the complaining witness in automobiles about midnight. Defendant La Caster showed complaining witness a badge and said, "Federal officers." Defendant Nunn came up with a shotgun and said, "Hands up." They all entered the house. They took from the complaining witness his pocketbook containing $23, also $2 in loose change from his pockets. They also took a barrel of wine and two five-gallon bottles of wine, a watch, two tires, and a bag of walnuts.

[1] Defendant La Caster contends that the trial court erred in failing to instruct the jury that his connection with the crime must be established beyond a reasonable doubt by evidence other than the testimony of accomplices. This is not the law. While more is required by way of corroboration than to raise a mere suspicion, it is only necessary that the corroborative evidence tend to connect the defendant with the commission of the offense. 8 Cal. Jur. 179, and cases cited. La Caster's connection with the commission of the offense was established by the testimony of the complaining witness. Furthermore, La Caster in his own testimony admitted his connection with the crime, and there would have been no reversible error in failing to give an instruction on the necessity of corroboration of an accomplice as to defendant's connection with the offense even if one had been offered by La Caster, which he did not do.

[2] La Caster's next contention is that the trial court erred in compelling him to conduct his own defense. The record shows that at the time of arraignment on December 24, 1934, the trial court appointed the public defender to represent him and his time to plead was continued to December 27th. On the latter date he entered a plea of "Not guilty," and the trial of the action was set for January 15, 1935. On that date the trial was continued to February 4th on motion of his counsel. On January 23d, for reasons not set forth in the record, the public defender was allowed to withdraw as attorney for appellant. On February 4th the case went to trial against all of the conspirators, La Caster representing himself, while all of the others were represented by counsel, one of them being represented by the public defender. The record does not show that the trial court compelled La Caster to act as his own counsel. Frequently a defendant in a criminal action feels that he can present his case more capably than an attorney. A defendant has a constitutional right to appear and defend in person. The fact that he does not win his case is no ground for a reversal of the judgment. In the instant case La Caster admitted his participation in the events complained of. He denied, however, entering the home of the complaining witness, contending that he remained in the automobile while the others obtained the loot.

[3] Defendant La Caster next contends that the trial court erred in ordering that his trial proceed along with the other defendants, denying his request for delay for the purpose of producing a Mrs. Tavenick and Lieutenant Anderson. The witness Tavenick had actually been in attendance at the court, but she had not been subpœnaed. The court permitted La Caster to state in the presence and hearing of the jury that what he wanted Mrs. Tavenick to testify to was that on Thanksgiving Day when the complaining witness accused him of striking him, he had a badly infected finger; that his hand was bound; and that it would have been impossible for him to have closed his hand at that time. In view

of La Caster's testimony above related, the testimony of Mrs. Tavenick would have been merely corroborative of his own testimony on a matter collateral to the issue, for the reason that he admitted being one of the five men who went to the farmhouse of complaining witness. The fact, if it be a fact, that he did not enter the house would not be a defense. Defendant had not taken the trouble to subpœna Lieutenant Anderson. We see no abuse of discretion in the court's ruling.

[4, 5] La Caster's next contention is that the trial court erred in ruling that he could not discuss his own testimony. The record shows that when the parties had rested and were ordered to proceed with the argument the court asked La Caster how long he wanted to talk to the jury, to which La Caster stated, "About thirty minutes," to which the court said, "You understand you cannot talk about your own testimony." La Caster's argument to the jury is not set forth in the record and there is no way of telling on appeal what he said to the jury. It is a fair presumption that he said to the jury whatever came into his mind, if he thought it would help him. Certainly we cannot presume from this meager record that he was deprived of any constitutional right. The record leaves no reasonable doubt that La Caster is guilty of the crime charged. In the absence of a clear showing of prejudice, we would not order a reversal. People v. Mayfield, 85 Cal. App. 77, 259 P. 75.

[6] La Caster's final contention is that the court erred in denying his motion to set aside the verdict of guilty and to dismiss the cause. This motion is unauthorized by law. People v. Hill, 1 Cal. App. 414, 82 P. 398. In this connection La Caster relies greatly upon People v. Schwarz, 201 Cal. 309, 257 P. 71. That case is not in point. In that case the court very specifically limited the remedy described therein to cases where no trial had been had on the merits. See the bottom of page 314 of 201 Cal., 257 P. 71, 73, where the court says: "This exceptional remedy applies only where no trial has been had on the merits."

[7] The defendant Nunn first asks for a reduction in the offense from robbery to grand theft for the reason that at the time of pronouncing judgment on a defendant named Treece, the trial court so reduced the offense as to him. After reading the record we would not be interested in such a request, especially in view of the trial court's statement made at the time that, "This man Nunn is the ringleader of this group. * * *"

[8] Defendant Nunn's final contention is that the trial court erred in refusing his motion to vacate the judgment and to hear and entertain evidence on the matter of probation. This motion the court held to be out of order. The Penal Code does not provide for such motion on such ground. Defendant Nunn also relies upon People v. Schwarz, supra. That case is not in point for the reason that defendant Nunn was given a trial on the merits.

The judgments and orders are affirmed.

I concur: McCOMB, Justice pro tem.

WOOD, Justice (concurring).

I concur in the judgment. In my opinion the trial court erred in ruling that defendant La Caster could not discuss his own testimony in his argument to the jury. The argument of defendant not being before us, we should presume that he obeyed the ruling of the court, and that in any event the court enforced its ruling. This error, however, should not cause a reversal of the judgment for the reason that La Caster virtually admitted his guilt while testifying as a witness. From his own testimony the jury could bring in no other than a verdict of guilty and defendant cannot possibly expect a reversal of the judgment on this point.

9 Cal.App.2d 407

In re FILIPPI'S ESTATE.

SAVIGLIANO v. FILIPPI.

Civ. 9960.

District Court of Appeal, First District, Division 1, California.

Oct. 9, 1935.

1. Appeal and error ⚷1012(1)

Appellate court has no authority to disturb findings of trial court even though court believes that preponderance of evidence seems to be against findings, nor will findings be disturbed although they appear to be against weight of evidence.

2. Appeal and error ⚷1011(1)

Direct evidence of one witness who is entitled to full credit is sufficient to create substantial conflict in evidence regardless of inferences supporting testimony to contrary; and existence of documentary evidence does not prevent application of rule (Code Civ. Proc. § 1844).

3. Appeal and error ⚷931(1)

Appellate court, in considering appellant's claim of insufficiency of evidence to support judgment, must construe evidence so as to support contentions of respondent to extent that it is fairly susceptible of such construction, and in cases of conflict, to accept as true evidence which tends to support finding, unless finding is inherently so improbable as to be palpably false.

4. Appeal and error ⚷1011(1)

Where evidence whether conveyance from father to son was intended to be a gift was conflicting, but there was ample evidence of completed conveyance, appellate court refused to disturb finding that deceased father in his lifetime made gift to son.

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Francesco Filippi, deceased, wherein Joseph Filippi, as administrator, filed final account for settlement and petition for distribution of estate, to which Vittoria Filippi Savigliano filed objections. From an adverse judgment, the objector appeals.

Affirmed.

W. S. Solari, of San Francisco (Albert Picard and Francis McCarty, both of San Francisco, of counsel), for appellant.

C. Harold Caulfield, of San Francisco, for respondent.

TYLER, Presiding Justice.

The question involved in this appeal is whether the evidence is sufficient to support the finding that a deed to certain real property executed and delivered to respondent was a gift which passed full and complete title to the property and the avails thereof.

The facts show that deceased, Francesco Filippi, was the father of nine children, and prior to his returning to Italy in 1915 was a resident of San Francisco, at which time he was the owner of two parcels of real property situated therein. By deed, absolute in form, executed in Italy on May 22, 1922, he conveyed one of these parcels by gift to his son Guiseppe Filippi, also known as Joseph Filippi. The property was subsequently sold by the donee in 1923 for the sum of $5,000. The father, Francesco Filippi, died testate in Italy on the 24th day of April, 1929. His will was admitted to probate and the son Joseph was appointed administrator with the will annexed. In due course the administrator filed his final account for settlement, together with a petition for distribution of the estate. Vittoria Filippi Savigliano, a daughter of the deceased and a legatee under his will, filed objection to the account and petition for the reason that the avails of the sale of the property conveyed to the son Joseph were not accounted for. The court overruled the objection and distributed the estate in the manner prayed for.

[1-4] As above indicated, the only question here involved is whether or not the evidence is sufficient to support the finding that deceased in his lifetime made a gift of the property in question to his son Joseph, the administrator herein. In support of her contention that the finding is unsupported, appellant relies upon expressions contained in letters written by the son to his father subsequent to the transfer of the property, and she also relies upon facts and circumstances relating to the disposition of the funds received by the son, as supporting her contention that the transfer in question was made to enable the son to conveniently sell the property for the benefit of his father, and as his trustee, and that the father never intended to part with the property or the proceeds of the sale thereof. We do not deem a recital of the correspondence between the father and son to be necessary. Suffice

it to say that there are many expressions and references to certain facts and circumstances in this correspondence, particularly with reference to the avails received from the sale of the property, from which an inference could be drawn to support appellant's contention. There are other expressions in the correspondence, however, which support respondent's contention that there was a completed conveyance. In addition thereto, respondent testified that his father had made him a gift of the property, and other evidence was to the effect that the father had intended to leave all his property to respondent, as his other children had shown no interest in his welfare. It is not the province of an appellate court to disturb the findings of the trial court even though it should believe that the preponderance of the evidence seems to be against the findings, nor will they be disturbed although they appear to be against the weight of the evidence. Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 P. 158. Under the Code of Civil Procedure, § 1844, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact except perjury or treason and is necessarily sufficient to create a substantial conflict in the evidence regardless of inferences supporting testimony to the contrary (Thom v. Stewart, 162 Cal. 413, 122 P. 1069), nor does the existence of documentary evidence prevent the application of the rule. Porter v. Miller, 201 Cal. 750, 258 P. 595. In considering an appellant's claim of the insufficiency of the evidence, it is the court's duty to so construe the evidence as to support the contentions of respondent to the extent that it is fairly susceptible of such construction, and in cases of conflict, to accept as true that evidence which tends to support the finding, unless it is inherently so improbable as to be palpably false. Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376; Neher v. Kauffman, 197 Cal. 674, 242 P. 713. In short, testimony in support of a finding, although contradicted, must on appeal be given the same weight as though uncontradicted, for the reason that findings on conflicting evidence are conclusive on an appellate court. In re Estate of Shay, 196 Cal. 355, 237 P. 1079. This rule is so firmly established as to amount to a maxim. Appellant stresses the fact that the deceased bequeathed money in a certain bank in San Francisco to petitioner herein, which amount it is claimed was part of the sum received from the sale of the property. Aside from what we have said concerning a conflict in the evidence, it is manifest that if, as the court found, there was an absolute transfer of the property to respondent, it was beyond the power of the grantor to recall the same.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

9 Cal.App.2d 361

MEYER v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 9541.

District Court of Appeal, First District, Division 2, California.
Oct. 7, 1935.

Rehearing Denied Nov. 6, 1935.
Hearing Denied by Supreme Court Dec. 5, 1935.

1. Municipal corporations 🔑733(1)

City and county was not liable for injuries to boy falling from car of miniature train in public park if, in operation of miniature railway, city and county was acting in governmental capacity, in absence of statute to contrary.

2. Municipal corporations 🔑733(1)

City and county operating miniature railway in public park was acting in governmental capacity, as respects liability for injuries to boy falling from car.

3. Municipal corporations 🔑851

City and county acting in governmental capacity in operating miniature railway in public park *held* not liable for injuries to boy falling from car, in absence of proof that train was dangerous or defective, that officer of municipality or person having authority to remedy such condition had notice or knowledge thereof, and that municipality or officer failed to remedy such dangerous or defective condition or to take action reasonably necessary to protect public within reasonable time (St. 1923, p. 675).

4. Municipal corporations 🔑851

Installation of wire panels on right-hand side of cars of miniature train between seats after boy fell from car *held* not admission of negligence.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Roy Meyer, a minor, by his guardian ad litem, Bert Meyer, against the City and County of San Francisco. Verdict for plaintiff, and from an order denying a motion for judgment notwithstanding verdict, defendant appeals.

Reversed, and judgment ordered for defendant.

John J. O'Toole, City Atty., and Henry Heidelberg, and Edmond P. Bergerot, Deputy City Attys., all of San Francisco, for appellant.

Vincent W. Hallinan, William F. Herron, Kenneth B. Dawson, and Alfred J. Hennessy, all of San Francisco, for respondent.

STURTEVANT, Justice.

On the 23d day of June, 1931, the plaintiff, a minor thirteen years of age, was riding on a miniature train which was being operated by the defendant in the "Fleishhacker Playground," one of the public parks of San Francisco. He fell off one of the cars and was injured. For the injuries so suffered he brought this action, and it was tried by the court sitting with a jury. When the plaintiff rested, the defendant made a motion for a nonsuit, its motion was denied, and it proceeded to introduce its evidence. After all of the evidence had been introduced the defendant made a motion for a directed verdict, and that motion was denied. Later counsel made their arguments, the court instructed the jury, and the cause was submitted. The jury returned a verdict in favor of the plaintiff. Before the verdict was entered counsel for defendant made a motion for judgment notwithstanding the verdict, and at the same time asked that the defendant be allowed to move for a new trial if its motion for judgment be denied. That motion was denied, and, from the order denying it, the defendant has appealed.

[1, 2] The plaintiff did not introduce evidence showing the train or any part thereof was "dangerous or defective." The cars did not, at the time of the accident, have side gates. The evidence showed, however, that the entire train was at that time of standard construction. It had been operated eight years without an accident. Subsequent to the accident wire panels were inserted on the right-hand side between the seats so that the passengers were compelled to board the train from the left-hand side instead of boarding from both sides. If, in the operation of the miniature railway, the defendant was acting in a governmental capacity, in the absence of a statute to the contrary, the defendant was not liable. Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505. That, under the facts recited above, the defendant was acting in a governmental capacity is a proposition that in this state is not open to debate. Kellar v. City of Los Angeles, supra; Crone v. City of El Cajon, 133 Cal. App. 624, 24 P.(2d) 846. But, it is asserted, we have a statute changing the rule. St. 1923, p. 675. The assertion is not a sufficient answer. Under that statute, four elements must be established to prove a case. Pittam v. City of Riverside, 128 Cal. App. 57, 16 P.(2d) 768. In that case, 128 Cal. App. 57, at page 59, 16 P.(2d) 768, 769, the court said:

[3, 4] "Under the provision of that portion of section 2 of the act, which we have quoted, the following conditions must exist to support the judgment of the court below: (1) The injuries to respondent through the destruction of his personal property must have resulted from a dangerous or defective condition of the dumping ground; (2) the city council of the city of Riverside, or some officer or person having authority to remedy such condition, must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy such dangerous or defective condition within a reasonable time after acquiring such knowledge or receiving such notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after such knowledge or notice."

No one of those elements was proved in the instant case. However, the plaintiff claims the defendant maintained and operated a defective device. As evidence thereof, he points to the fact that after the accident the defendant made certain alterations. It caused the wire panels to be installed. Such fact was not evidence of an admission of negligence. 45 C. J., p. 1232; Webster v. Orr, 174 Cal. 426, 428, 163 P. 361; Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 61, 62, 27 P. 590. It follows that the plaintiff did not prove a case under the statute relied on.

The defendant's motion for judgment notwithstanding the verdict should have been granted. The order appealed from is reversed, and judgment is ordered in favor of the defendant.

We concur: NOURSE, P. J.; SPENCE, J.

McDONALD v. SEVERY et al.*

Civ. 10229.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1935.

Hearing Granted by Supreme Court Nov. 29, 1935.

1. Appeal and error ⚷1008(1)
Trial court's finding upon issues of fact raised by affidavits is conclusive on appeal.

2. Dismissal and nonsuit ⚷43(4)
Dismissal of action *held* properly set aside where court found that dismissal was filed in violation of understanding between parties (Code Civ. Proc. §§ 473, 2009).

3. Appeal and error ⚷973
Setting aside of dismissal of action on ground that dismissal was obtained in violation of understanding between parties would not be disturbed on appeal in absence of clear showing of abuse of discretion.

4. Dismissal and nonsuit ⚷43(5)
Order vacating dismissal of action against two defendants *held* not erroneous because codefendant had no notice of motion to vacate order of dismissal, where codefendant had not been served with process in action (Code Civ. Proc. §§ 473, 2009).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Emmet Wilson, Judge.

Action by Frank C. McDonald against Victor H. Severy and Electrotone Corporation of America, Limited. From an order vacating a dismissal of action, second-named defendant appeals.

Affirmed.

Avery M. Blount, of Los Angeles, for appellant.

David Licker and Leo L. Schaumer, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal by defendant Electrotone Corporation of America, Limited, from an order vacating a dismissal of this action against appellant.

This action was brought on November 1, 1933, by plaintiff as assignee of ten claimants to recover wages due from defendants. On May 9, 1934, defendant Severy entered into a written agreement with C. S. Murphy and associates, as parties of the first part, by which, after reciting that the latter had a claim for labor and the filing of this action, Severy agreed to confess judgment, to pay $500 on or before May 20, 1934, and assigned and agreed to assign certain property as security for the performance of the agreement. It was also agreed that execution on the judgment be stayed until July 20, 1934, and that the parties of the first part would forthwith file a dismissal of the action as against defendant Electrotone Corporation. The dismissal was executed, dated April —, 1934, delivered to the attorney for Severy and filed May 15, 1934. Appellant asserts that no summons or process of any kind was ever served upon it and no appearance made in its behalf.

In August, 1934, plaintiff served notice of motion to vacate the dismissal upon counsel for defendant Severy, defendant Electrotone Corporation having apparently not yet been served in the action, supported by an affidavit by Clifford S. Murphy in which, among other things, it was alleged that the written request for a dismissal was delivered to the attorney for Severy upon the express understanding that it was not to be filed until the stipulated $500 had been paid and all other arrangements contained in the agreement had been carried out, but that, contrary to this agreement and without paying the $500, Severy caused the dismissal to be filed and secured an order for the dismissal of the action. These allegations were denied by the affidavit of Severy. The court decided the issues thus raised against Severy and made the order vacating the order of dismissal and extending the time of Electrotone Corporation to plead to the complaint, from which order this appeal is taken.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 98.

[1-3] The finding of the trial court upon the issues of fact raised by the affidavits is conclusive on appeal. Since that court found that the dismissal was filed contrary to and in violation of the understanding between the parties, the court properly set the dismissal aside. The fact that the written agreement provided for a dismissal forthwith is not, as contended by appellant, conclusive. If, as alleged in the Murphy affidavit, which obviously was accepted by the court as correctly stating the facts and which supports the court's order, the contract itself was not to become effective and the dismissal was not to be filed until the $500 had been paid, the filing thereof prior to such payment was unauthorized and the court, acting under section 473 of the Code of Civil Procedure, did not abuse its discretion in setting the dismissal aside. In the absence of a clear showing of abuse of such discretion, the order of the trial court will not be disturbed on appeal. Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148. Furthermore, as stated in the case cited, it is the policy of the law to favor, wherever possible, a hearing on the merits.

While making the contention, appellant has cited no authority that the court below could not act upon proof by affidavit. Affidavits may be used in support of motions under section 473 of the Code of Civil Procedure and other motions, and section 2009, Code of Civil Procedure, provides for the use of affidavits as evidence upon motions.

Appellant's argument based on the law governing the rescission of contracts is not in point. We are not dealing with an action for rescission.

[4] It is argued that appellant should have had notice of the motion to vacate the order of dismissal, although in the same breath it is contended that at the time of the motion it had not been served in the action. No authority is cited that in such a case appellant was entitled to notice. The court had before it the simple question of vacating a dismissal which would not have been ordered had the court known the facts as it found them on the hearing of the motion. To this proceeding appellant was not a necessary party as, so far as the record shows, it had not appeared in the action and was at that time an entire stranger to what had gone before.

The order vacating the dismissal is affirmed.

CRAIL, Presiding Justice (concurring).

I concur in the opinion of Justice FRICKE. While the Electrotone Corporation was not charged with fraud in the procurement of the contract under which the dismissal was obtained, nevertheless the contract was made for its benefit and the contract's provisions could be voided under the circumstances of this case both for fraud and for failure of consideration, not only as to the maker of the contract, but also as to the party for whose benefit it was made.

It is true that the corporation was not served with notice of the motion to vacate the dismissal, but it had not yet appeared in the action; indeed it had not yet been served with summons and a copy of the complaint. Under the circumstances of this case, it was not entitled to notice of the motion to vacate the dismissal. Sections 650 and 1014, Code Civ. Proc.

While it is the general rule that a dismissal of an action finally terminates it, this does not mean that the order dismissing the action is not subject to direct attack under section 473 of the Code of Civil Procedure. 9 Cal. Jur. 517, and cases cited.

WOOD, Justice (dissenting).

I dissent. Plaintiff filed the action naming two defendants. He then entered into an agreement in writing with one of them, defendant Severy, by which Severy agreed to pay $500 on or before May 20, 1932, and plaintiff agreed to "forthwith file a dismissal * * * against Electrotone Corporation of America," the other defendant. The dismissal was delivered to Severy's attorney and filed on May 15, 1934. Plaintiff sought an order of court vacating the dismissal and based his motion upon an affidavit in which facts are set forth charging fraud and misrepresentation on the part of defendant Severy. It is not charged in the affidavit that defendant Electrotone Corporation, appellant herein, was guilty of fraud or misrepresentation. At the time the order vacating the dismissal was entered, defendant Electrotone Corporation had not been served with notice of the motion to vacate the dismissal.

Under these circumstances, the fraudulent acts of the other defendant, as impliedly found by the court, cannot be imputed to appellant. There is nothing in the record to show that defendant corporation took any part in arranging for the dismissal.

The record discloses that the action was terminated as to defendant corporation without notice and thereafter reinstated as to said defendant without notice. In my opinion the general rule that a dismissal finally terminates the action is applicable here. In Smurda v. Superior Court, 266 P. 843, 845, this court said: "The effect of a dismissal, where the answer seeks no affirmative relief * * * is ipso facto to terminate the case and oust the court of jurisdiction to proceed." Huntington Park Imp. Co. v. Superior Court, 17 Cal. App. 692, 121 P. 701; Hopkins v. Superior Court, 136 Cal. 552, 69 P. 299; Kaufman v. Superior Court, 115 Cal. 152, 46 P. 904.

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9 Cal.App.2d 343

KATENKAMP v. DEPARTMENT OF FINANCE, DIVISION OF STATE LANDS et al.

Civ. 10428.

District Court of Appeal, Second District, Division 2, California.
Oct. 4, 1935.

1. Certiorari 🔑33(3)

Certiorari to review granting of permits by the Department of Finance to corporation to construct groins extending into sea which created new beach front in front of permittee's land and denuded petitioner's beach front of sand was not available to petitioner who was not a party to original proceeding out of which granting of permit arose (Code Civ. Proc. §§ 1069, 1074).

2. Certiorari 🔑21

Granting permit to maintain groin upon state-owned tidelands with no notice of application required by law, no hearing prescribed, and no judicial determination of any right involved, does not constitute judicial function, and hence is not reviewable by certiorari.

3. Constitutional law 🔑46(3)

Constitutionality of act under which permits to maintain groin upon state-owned tidelands were issued was not reviewable on certiorari (Pol. Code, § 690.10).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Certiorari by J. F. Katenkamp to review the granting of a permit by the Department of Finance, Division of State Lands, and W. S. Kingsbury, as Chief of the Division and ex officio registrar of State Lands, allowing certain corporation to maintain groins upon state-owned tidelands near petitioner's property. From a decree affirming the granting of the permits, the petitioner appeals.

Judgment affirmed.

Leland Crawford, of Santa Barbara, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell and Eugene M. Elson, Deputy Attys. Gen., for respondents.

GOULD, Justice pro tem.

The California State Department of Finance, Division of State Lands, acting through its chief of division, granted to Union Realty Company, a corporation, permits to maintain two groins upon certain state-owned tidelands in Miramar Bay, Santa Barbara county, upon which tidelands the property of said permittee abutted. These permits were issued pursuant to authority conferred by section 690.10 of the Political Code. Thereafter petitioner herein, owner of other littoral land on Miramar Bay about 250 feet distant from that of the Union Realty Company, brought the present action in the superior court asking for a writ of certiorari to review the action of the Department of Finance in granting the permits, and to annul and set aside said permits. Petitioner claimed that the groins as constructed, being in the nature of bulkheads or breakwaters extending into the sea, had the effect of creating a new beach in front of permittee's lands and at the same time denuded his own beach front of sand, thus accomplishing a taking of private property for public purpose without due process of law. A demurrer to the petition was sustained by the lower court, petitioner declined to amend, judgment for respondents was entered, and from that judgment petitioner appeals.

We are of the opinion that the demurrer was properly sustained and that the act of the Department of Finance complained of may not be judicially reviewed in this proceeding.

[1] Respondents raise the point that petitioner has no right to maintain this action. In the first place, petitioner was not a party to the original proceeding out of which this contention has arisen. Section 1069 of the Code of Civil Procedure provides that "the application must be made on the verified petition of the party beneficially interested," and it has been repeatedly held that, as to court actions, the writ will not issue in favor of strangers to the record. Elliott v. Superior Court, 144 Cal. 501, 77 P. 1109, 103 Am. St. Rep. 102. Exception to this rule has been allowed in the case of a taxpayer acting for the whole body of taxpayers generally (Maxwell v. Board of Supervisors, 53 Cal. 389), but we find no California instance which would act as a precedent for petitioner in such a situation as that sought to be reviewed here.

[2] However, we find it unnecessary to determine the question of petitioner's right to maintain this proceeding, because, even assuming such right, we believe the act complained of here is not reviewable by writ of certiorari. Granting a permit to maintain a groin, with no notice of the application required by law, no hearing prescribed and no judicial determination of any right involved, does not constitute a judicial function, but rather a ministerial or executive one. As such, it is not reviewable by writ. Frasher v. Rader, 124 Cal. 132, 56 P. 797; Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82.

[3] Petitioner also attacks the constitutionality of the act under which the permits were issued. Such inquiry is beyond the scope of the writ (Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822), which is limited by section 1074 of the Code of Civil Procedure to an inquiry as to whether "the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

Petitioner's redress for his alleged injury is not to be sought by writ of review.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 383

THOMAS v. SUPERIOR COURT IN AND FOR BUTTE COUNTY et al.

Civ. 5491.

District Court of Appeal, Third District, California.

Oct. 8, 1935.

Hearing Denied by Supreme Court Dec. 5, 1935.

1. Mandamus ⚷154(2)

Wife's petition for mandamus to require court to issue order to husband to show cause why he should not be adjudged guilty of contempt for failure to pay alimony *held* not insufficient because complaint in divorce failed to affirmatively demand judgment for alimony and minute order failed to specify award of alimony, where complaint alleged that written agreement of property rights was executed between parties and requested that payments agreed to be made by husband should be incorporated in decree of divorce, and court in minute order specifically allowed alimony to wife.

2. Divorce ⚷186

Holding on prior appeal that minute order in divorce case was not intended as final judgment, but that formal interlocutory decree was intended as judgment settling rights of respective parties, became law of case in subsequent proceeding by wife to compel court to issue order to husband to show cause why he should not be adjudged guilty of contempt for failure to pay alimony.

3. Mandamus ⚷42

Mandamus *held* to lie to compel superior court to issue order to husband to show cause why he should not be adjudged guilty of contempt for failure to pay alimony required by provisions of judgment, where petition alleged that husband was in default of payment and that he was financially able to pay and that he had willfully failed to pay, with purpose of harassing and annoying wife.

◆

Mandamus proceeding by Suzette Thomas against the Superior Court of the State of California in and for the County of Butte and the Hon. Harry Deirup, Judge thereof.

Writ of mandamus issued.

See, also, 129 Cal. App. 282, 18 P.(2d) 755; 129 Cal. App. 786, 18 P.(2d) 756; (Cal. App.) 41 P.(2d) 220.

William Ellis Lady, of Los Angeles, for petitioner.

Horowitz & McCloskey, of Los Angeles, for respondents.

PER CURIAM.

This is a petition for a writ of mandamus to require the superior court of the county of Butte to issue an order for the defendant in a divorce case to show cause why he should not be adjudged guilty of contempt for failure to pay alimony required by the provisions of a judgment which was rendered against him.

The petitioner and Clyde Thomas were husband and wife. Dissensions arose between them, and they executed a written settlement of property rights in which it was provided that in the event of a divorce "Clyde Thomas is to pay, and does by these present agree to pay unto the said wife, Suzette Thomas, the sum of Fifty ($50.00) Dollars per month, to be paid to his said wife until she may remarry." A complaint for divorce was subsequently filed by this petitioner against her husband in which it was alleged that the agreement in settlement of property rights had been previously executed and "that in said agreement heretofore made certain payments were agreed to be made to the plaintiff herein by the defendant which payments defendant will be bound to pay and plaintiff bound to receive, and if a decree of divorce is entered in this matter said payments shall be included in said decree of divorce and be payable to the plaintiff according to the terms of said agreement." The prayer of the complaint then asked for a decree of divorce and "that the payments agreed to be made by the defendant to plaintiff be incorporated in a decree of divorce and be made payable to plaintiff; and for such other and general relief as the court shall deem meet and proper." This complaint was duly served upon the defendant, who failed to appear or answer the same within the time allowed by law or at all and his default was duly entered. October 2, 1928, the cause was tried in the absence of the defendant. Witnesses were sworn and examined and a minute order was entered in the following language: "Interlocutory decree ordered." On the same date a written interlocutory decree of divorce was duly signed and filed containing the following provision with respect to alimony: "It is further ordered, adjudged and decreed that the defendant herein pay to the plaintiff herein the sum of Fifty ($50.00) Dollars per month as alimony for the support and maintenance of said plaintiff until such time as the said plaintiff may remarry." After a lapse of one year and on October 8, 1929, a final decree of divorce was duly entered containing the following language with respect to the settlement of property rights and alimony: "It is further ordered, adjudged and decreed that the defendant herein pay to the plaintiff herein the sum of Fifty ($50.00) Dollars per month as alimony for the support and maintenance of said plaintiff until such time as the said plaintiff may remarry, in accordance with property settlement entered into between plaintiff and defendant under date of September 12, 1928." For a period of time the defendant paid these installments of alimony, but subsequently defaulted with respect to such payments.

It is alleged in the petition for a writ of mandamus that the defendant in the divorce proceeding failed and neglected to pay the petitioner any installments of alimony from or after February, 1934, and that he is in default of such payments in the aggregate sum of $850; that at all times mentioned he has been and now is employed as an assistant United States district attorney, receiving a salary therefor in the sum of $225 a month and that he has failed and neglected to make said payments of alimony with the willful purpose of harassing and annoying the petitioner; that after the defendant's default as above stated the petitioner duly made an application to respondent in said divorce proceeding, based upon said alleged facts and asked that court to issue a citation therein for the defendant to show cause why he should not be adjudged guilty of contempt for failure to pay the alimony above mentioned; that the court denied petitioner's application and refused to issue a citation therein. Thereupon this petition for a writ of mandamus was filed in this court, praying for an order directing the respondent to show cause why he should not be adjudged guilty of contempt of court for failure to pay alimony as directed by the decree of divorce and praying that the court be required to proceed to hear and determine the question of the defendant's alleged contempt.

Upon this hearing it is contended by the respondent that the petition is insufficient to warrant the issuing of a writ of mandamus for the reasons that the complaint in divorce fails to affirmatively demand judgment for alimony and that the minute order which was entered at the trial of the divorce proceeding fails to specifically award alimony to the plaintiff and fails to approve or adopt the alleged written settlement of property rights between the parties. It is asserted the court was therefore without authority to render either the interlocutory decree or the final decree of divorce awarding alimony to this petitioner. It is asserted that the minute order which was entered upon the trial of the cause amounts to a judgment which is binding upon this petitioner in that regard and that it contains no affirmative order of the court for the defendant in that proceeding to pay to the plaintiff any sum of money as alimony or otherwise.

[1] We are of the opinion that the complaint in the divorce proceeding sufficiently alleges the execution of the written settlement of property rights and a sufficient request for the court to approve and adopt the same as a part of its judgment and to allow the plaintiff in that action the sum of $50 a month as alimony. The defendant failed and neglected to appear or answer the complaint. Even though the language might have been more certain and specific, the defendant in the divorce proceeding may not complain of what appears to us to be a fair construction of the pleading. The complaint first alleges that the written agreement of property rights was executed between the parties and then specifically requests "that the payments agreed to be made by the defendant to the plaintiff be incorporated in the decree of divorce and be made payable to plaintiff."

It is true that reputable authorities have held that where a minute order of the trial of a divorce case has been entered which purports to determine the issues of the proceeding it may be deemed to be the judgment which will be controlling in subsequent proceedings. These authorities, however, are readily distinguishable from the present case. It is apparent from the meager language employed in the minute order of the divorce proceeding in this case that it was not intended by the court as a determination of the issues of the divorce proceeding, for it merely recites, "Interlocutory decree ordered." At the time this minute order was made the court signed and filed a formal interlocutory decree of divorce in which the court specifically allowed plaintiff $50 a month "as alimony for the support and maintenance of said plaintiff" and directed the defendant to pay the same. In the final decree of divorce this same language was employed. It is evident that the court did not intend to have the issues of the divorce proceeding determined by the mere entry of the minute order, but upon the contrary a formal decree determining all of the issues of the proceeding was then signed and filed as its judgment therein. The case of Baxter v. Baxter, 3 Cal. App. (2d) 676, 40 P.(2d) 536, 537, relied upon by the respondent, holds that a minute order granting a divorce, approving a property settlement and awarding the custody of children did purport to determine the issues of that case and that it was therefore controlling as a judgment. In that case, however, the minute order was very complete and specific for it contained the following language: "Interlocutory decree of divorce granted plaintiff. Property settlement approved; decree is made in accordance therewith. Minor children granted to the plaintiff until the further order of the court." In the present case the minute order does not purport to settle property rights or make an award of alimony or even determine the right to a divorce. It merely says, "Interlocutory decree ordered." The very language of this minute order contemplates the making and entry of a formal judgment to determine the issues involved in the case. This is vitally different and readily distinguishable from the Baxter Case.

[2] On a previous appeal to this court in the case of Thomas v. Superior Court of Butte County, 129 Cal. App. 282, 18 P. (2d) 755, it was held that this very minute order was not intended as a final judgment of the court and upon the contrary it was determined that the formal interlocutory decree was intended as the judgment settling the rights of the respective parties. That decision becomes the law of this case. In that case the Appellate Court said: "While it is true that a minute order might be sufficient to carry out the directions of the court, nevertheless the order here made shows upon its face that it was not intended as a final judgment of the court."

[3] We are of the opinion that the petition in this case contains sufficient allegations that the defendant in the divorce proceeding is in default of the payment of alimony which he was duly ordered by the terms of the final judgment of the trial court to pay, and that he is financiallv able to pay the same, for the petition alleges

that he is earning $225 a month and that he has *willfully* failed to pay the alimony *with the purpose of harassing and annoying the petitioner.*

We are therefore of the opinion that the writ of mandamus should issue as prayed for. It is so ordered.

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9 Cal.App.2d 371

McVICAR-ROOD-BURKETT WELL NO. 1, Inc., v. CRUDE OIL DRILLING CO., Limited, et al.

Civ. 10432.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1935.

Hearing Denied by Supreme Court Dec. 5, 1935.

1. Appeal and error ⇨1011(1)

Where there was conflict of testimony with sufficient evidence to support findings, findings must be upheld.

2. Trial ⇨395(1)

In action on contract with owners to place idle oil on production and thereafter to operate well, which provided for reimbursing contractor for extraordinary production costs, issue of meaning of clause as to extraordinary production expense *held* sufficiently covered by findings to support judgment, where one of findings stated that contractor after completing work of drilling and placing well on production performed certain reconditioning work which increased production of well, and one of conclusions of law stated that reconditioning work constituted extraordinary production costs.

3. Trial ⇨404(2)

Finding may be regarded as one of fact even though mistakenly placed among conclusions of law.

4. Mines and minerals ⇨83

In action on contract with owners to place idle oil well on production and to operate well, evidence *held* to justify finding that expenses of reconditioning well after its completion constituted extraordinary production costs, for which contractor was to be reimbursed, notwithstanding testimony that contractor's officer, in answer to question as to meaning of term "extraordinary production costs," replied, cost of pumping and compressor equipment, where there was no statement that officer said that no other items could be included.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by McVicar-Rood-Burkett Well No. 1, Incorporated, against the Crude Oil Drilling Company, Limited, substituted for Edington Oil & Refining Company, Limited, and others, wherein named defendant filed a cross-complaint. From a judgment for plaintiff, named defendant appeals.

Affirmed.

E. D. Reiter, Ellis D. Reiter, Walter S. Barrette, and Francis M. Reiter, all of Los Angeles, for appellant.

Cree & Brooks, of Long Beach, for respondent.

WOOD, Justice.

Plaintiff corporation entered into a contract with the owners of an oil well which had become idle and unproductive because of mechanical difficulties, whereby it agreed to place the well upon production and thereafter to operate it. The contract provided that plaintiff should receive as its compensation a certain percentage of the proceeds realized from the sale of the products of the well. Plaintiff performed the services promised and commenced this action to recover $6,725.07, the amount claimed to be due under the terms of the contract. The trial court rendered judgment for plaintiff, and defendant appeals.

[1] An issue was raised at the trial as to the date on which the well was completed. The point bears importance for the reason that the contract provided for reimbursing plaintiff for "extraordinary production costs" and the trial court allowed plaintiff a certain sum under this heading for work done between May 23, 1934, the date claimed by plaintiff as the date of completion, and July 29, 1934, the date claimed by defendant as the date of completion. The findings on this issue are attacked by appellant, but we find a conflict of testimony on the point with sufficient evidence to support the findings, which must therefore be upheld now.

[2, 3] The defendant asserts that the trial court failed to find upon a material issue and argues that a finding should have been made on "the meaning of that clause as to extraordinary production expense." Conceding, without deciding, that such a finding

was necessary, the issue was sufficiently covered by the findings to support the judgment. Finding IV is as follows: "That the plaintiff and cross-defendant, after completing the work of drilling and placing the said well upon production, performed certain reconditioning work therein and thereon whereby the production of the said well was increased." Under the heading "Conclusions of Law" we find this language: "That the work of reconditioning referred to in paragraph IV of the Findings subsequently done by plaintiff and cross-defendant in and upon the said well constituted extraordinary production costs incurred by the said plaintiff and cross-defendant." A finding may be regarded as one of fact even though mistakenly placed among the conclusions of law. In re Forrester, 162 Cal. 493, 123 P. 283; Collins v. Ramish, 182 Cal. 360, 188 P. 550. There is nothing in the pleadings or in the stipulation of facts by counsel to require more specific findings than those made.

[4] To support its argument that the court erred in allowing plaintiff, under the heading "extraordinary production costs," the expenses of reconditioning the well after its completion on May 23, 1934, defendant refers to the testimony of certain witnesses as to a conversation that took place between the parties prior to the execution of the contract. These witnesses testified that Mr. McVicar, acting on behalf of plaintiff corporation, was asked what was meant by the term "extraordinary production costs," and he replied, in substance, the cost of buying a pump, "if they had to put it on a pump, buy pumping equipment or compressor." In reply to another question he stated that the cost would be $4,000 or $5,000. This testimony was not contradicted. Defendant now contends that the court was limited to the items mentioned by Mr. McVicar in fixing the amount of the allowance under the heading under discussion. Plaintiff argues that Mr. McVicar mentioned the pumping and compressor equipment only as illustrations. The witnesses did not testify that Mr. McVicar said that no other items could be included under the classification of extraordinary production costs. We are of the opinion that the evidence as a whole justifies the ruling of the court.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

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9 Cal.App.2d 341

GRADY v. CANFIELD et al.

Civ. 10343.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1935.

1. Master and servant 🔑403

Presumption of negligence imputed to employer by provision of Workmen's Compensation Act authorizing injured employee to bring action at law against employer who fails to secure payment of compensation *held* to amount to evidence which raises conflict, and may outweigh positive evidence adduced to rebut it (Gen. Laws 1931, Act 4749, § 29 (b).

2. Appeal and error 🔑1011(1)

In action by employee against employer, a self-insurer, for injuries, where questions of due care, negligence, and safety of working conditions and material were presented to trial court upon conflicting evidence, appellate court could not interfere with trial court's determination for plaintiff (Gen. Laws 1931, Act 4749, § 29 (b).

3. Master and servant 🔑278(8)

In action by employee against employer, a self-insurer, for injuries received when employee, while working as carpenter in construction of lumber shed, stepped upon rafter which broke, evidence *held* to support finding for plaintiff (Gen. Laws 1931, Act 4749, § 29 (b).

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by George W. Grady against Perry E. Canfield and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hahn & Hahn, of Pasadena, for appellants.

Sherman & Sherman and Glenn M. Still, all of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff, while working for defendants as a carpenter in the construction of a lumber shed, stepped upon a rafter which broke, precipitating him to the ground and causing injuries for which the trial judge awarded damages in the sum of $2,140. Defendants' appeal raises the questions as to whether they violated any duty they owed plaintiff, i. e., whether they were negligent, and whether the evidence supports the findings.

[1] Defendants as employers did not carry workmen's compensation insurance, nor were they self-insured. Plaintiff therefore invoked the provisions of section 29(b) of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831, as amended; Deering's Gen. Laws 1931, Act 4749, vol. 2, p. 2272), which provides that if any employer shall fail to secure the payment of compensation as set forth in said act, an injured employee, in addition to making application for compensation with the industrial accident commission, "may bring an action at law against such employer for damages, the same as if this act did not apply," and further stipulates "that in such action it shall be presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof shall rest upon the employer, to rebut the presumption of negligence. In such proceeding it shall not be a defense to the employer that the employee may have been guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow-servant. No contract, rule or regulation shall be allowed to restore to the employer any of the foregoing defenses."

The presumption of negligence imputed to the employer by the foregoing provisions of the act in itself amounts to evidence, which raises a conflict, and may outweigh positive evidence adduced to rebut it. Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529.

[2] In addition to this presumption, testimony was introduced that the rafter as furnished by defendants was cross-grained and defective, that defendants ordered poor grades of lumber to be used in the building, and that no walkways or scaffolding were provided. The questions of due care, negligence, and safety of working conditions and material were presented to the trial court upon conflicting evidence, and with that court's determination in plaintiff's favor we may not interfere.

[3] As to the claim that the evidence does not support the findings, we have examined the record in detail and feel that the findings considered as a whole have ample evidentiary support.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

4 Cal.2d 445

CAMBRA v. JUSTICE'S COURT OF SANTA ANA TP. et al.

L. A. 15301.

Supreme Court of California.

Oct. 10, 1935.

Justices of the peace ⇨52

Action to recover $584 damages sustained in automobile collision occurring in township having no class A justice's court *held* within exclusive jurisdiction of class A justice's court in another township in same county, in view of repeal of statute restricting territorial jurisdiction of class A justice's court to its township line (Code Civ. Proc. § 82, as added by St. 1933, p. 1810).

In Bank.

Proceedings on the application by Gloria Cambra for writ of mandate prayed to be directed to the Justice's Court of Santa Ana Township, Orange County, and Kenneth E. Morrison, Justice of the Peace, to compel them to file a complaint in a civil action.

Peremptory writ of mandate issued.

Prior opinion, 42 P.(2d) 372.

Forgy, Reinhaus & Forgy, of Santa Ana, for petitioner.

Head, Wellington & Jacobs and H. C. Cameron, all of Santa Ana, for respondents.

WASTE, Chief Justice.

Petitioner seeks a writ of mandate directing the respondent court and the justice thereof to receive and file a complaint in a civil action, and in other ways to entertain and exercise jurisdiction of the cause of action therein stated. The respondents refused to permit the complaint to be filed, and this application for a writ followed.

The question squarely presented is whether the superior court of Orange county or the justice's court of Santa Ana Township in that county, which is a "Class A justice's court," has jurisdiction of the subject-matter of the cause of action. Application for the writ was first made to the District Court of Appeal of the Fourth Appellate District, which court ordered a writ to issue as prayed for. However, because the members of the bar throughout the state have professed ignorance and uncertainty concerning the correct application of legislation enacted in 1933 for the express purpose of settling, among other questions, the exact issue now raised, this court, while of the view that the District Court of Appeal was correct, took over the cause for final consideration and decision. We are satisfied the District Court of Appeal properly decided the issue.

The only necessary facts to be stated are that in September, 1934, the petitioner was injured in an automobile collision in Huntington Beach township, Orange county, wherein there is a "Class B justice's court." The petitioner prepared her complaint seeking $584 damages, and offered it for filing in the respondent justice's court of Santa Ana township, which is a "Class A justice's court" in the same county. The respondents refused to accept it, and this proceeding resulted. The District Court of Appeal held that the amendments of various sections of the Code of Civil Procedure adopted in 1933 did away with territorial limits, in so far as the jurisdiction of the courts is concerned, within those counties in which class A justice's courts are established; that such legislation was enacted in keeping with the policy of taking away from the superior courts, and placing in the justice's and municipal courts, as much litigation as possible, and resulted in giving to class A justice's courts in counties wherein such a court (or courts) existed jurisdiction of any controversy involving up to $1,000 arising in the county, whether within the territorial limits of the township or not.

The history and analysis of the applicable Code enactments, particularly when viewed in the light of the purpose for which they were adopted, seem to clearly support the conclusion of the District Court of Appeal. For a carefully prepared analysis of the sections, we commend consideration of the work of Professor W. B. Owens, of Stanford University, contained in his "Explanatory Statement of the Scope and Purpose of the 1933 Revision of the Code of Civil Procedure," originally prepared by him for consideration by the California Code commission when the measures were in course of preparation for introduction in the Legislature.

The purpose of the creation of municipal courts and justice's courts of class A was primarily to relieve the calendars of the superior courts in counties wherein such courts are created. The establishment of a municipal court or a justice's court of class A in a county affects only the previously existing jurisdiction of the superior court of the county "wherein such municipal or justices' court is established." Section 82, Code Civ. Proc., as added by St. 1933, p. 1810. The establishment of the justice's court of class A in Santa Ana township with jurisdiction over demands, such as the claim for damages here involved, amounting to $1,000, ousted the superior court of Orange county of jurisdiction of the cause. The justice's court of class B in Huntington Beach township, limited in this class of cases to demands of $300, cannot take jurisdiction. The superior court of the county, having been deprived of jurisdiction of such causes, the proper and only court for the trial of the cause now in the county is the justice's court of class A, established and functioning in Santa Ana township, the respondent here.

Let a peremptory writ of mandate issue as prayed for.

We concur: SHENK, J.; SEAWELL, J.; LANGDON, J.; THOMPSON, J.; CONREY, J.; CURTIS, J.

9 Cal.App.2d 364

WISE v. CITY OF LOS ANGELES.*

Civ. 10454.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1935.

Rehearing Denied Nov. 4, 1935.

1. **Appeal and error ⇨996**

Where there is sufficient evidence considered with inferences reasonably drawn therefrom to sustain material finding, verdict must be sustained on appeal regardless of evidence tending to contrary conclusion.

2. **Municipal corporations ⇨791(2)**

Municipality is liable for damages resulting from defective streets, in absence of actual notice of dangerous condition, where presumption of constructive notice is created from existence of dangerous condition for unreasonable length of time.

3. **Appeal and error ⇨1008(1)**

In action for injuries which resulted from dangerous condition of street caused by hole dug and left by employees of municipality, whether dangerous condition had existed for sufficient length of time to constitute constructive notice and reasonable time to remedy the condition were questions of fact for trial court.

4. **Municipal corporations ⇨790**

In action for injuries which resulted from dangerous condition of street caused by hole dug by one of municipality's surveyors, notice of such condition to municipality other than that to surveyor who created the dangerous condition *held* unnecessary.

Appeal from Superior Court, Los Angeles County; H. D. Burroughs, Judge.

Action by Lillian Wise against the City of Los Angeles. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Ray L. Chesebro, City Atty., and Frederick Von Schrader and Thatcher J. Kemp, Deputy City Attys., all of Los Angeles, for appellant.

C. E. Hollopeter, of Alhambra, and Kent C. Rogers, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff and against defendant in an action for damages for personal injuries sustained by plaintiff found to have resulted from a hole, six inches square and six inches deep, dug and left by defendant's employees in one of its public streets for a period of four or five days. The trial court found in favor of the plaintiff on each material allegation in the complaint and assessed damages in the sum of $1,035.

Defendant relies for reversal of the judgment on three propositions:

First. The evidence is insufficient to support the findings of fact.

Second. The defendant muncipality is not liable for injuries resulting from a defective condition of one of its streets in the absence of actual knowledge or actual notice of such dangerous or defective condition.

Third. The existence of a defective condition in a public street for the period of four or five days does not as a mat-

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*Rehearing denied 50 P.(2d) 1079.

ter of law constitute constructive notice to the municipality and a reasonable time to remedy the condition under the Public Liability Act of 1923, Statutes of 1923, page 675, Act 5619, Deering's General Laws, volume 2, page 3052.

[1] As to defendant's first proposition, we have examined the evidence and are of the opinion there was sufficient evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact in favor of plaintiff. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Koberle v. Hotchkiss (Cal. App.) 48 P.(2d) 104.

[2] Turning to defendant's second proposition, the defendant municipality is liable for damages, resulting from a defective condition existing in one of its streets, in the absence of actual knowledge or actual notice of the dangerous condition of the street, where, as in the instant case, a presumption of constructive notice has been created from the existence for an unreasonable length of time of the dangerous condition. Hook v. City of Sacramento, 118 Cal. App. 547, 553, 5 P.(2d) 643; Nicholson v. City of Los Angeles (Cal. App.) 48 P.(2d) 986.

[3] Turning to defendant's final proposition, it is a question of fact for the trial court to determine whether the dangerous condition in the public street had existed for a sufficient length of time to constitute constructive notice, and also whether a reasonable time to remedy the condition had existed. Hook v. City of Sacramento, 118 Cal. App. 547, 554, 5 P.(2d) 643.

[4] Furthermore, the defendant municipality had actual notice of the dangerous condition of the public street, since the testimony was to the effect that one of the surveyors of the defendant city dug the hole in the public street and another witness testified that it was not refilled. On this state of facts, the defendant, having created the dangerous condition through its agents, had knowledge of the defect at that time and needed no further notice. Oklahoma City v. Hayden, 169 Okl. 502, 37 P.(2d) 642, 644.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 411

FUENTEZ v. HENNESSY.

Civ. 9850.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1935.

Hearing Denied by Supreme Court Dec. 5, 1935.

Limitation of actions ⚿46(1)

Claim founded on written agreement to pay $7,500 on date of receiving amount to be left deceased by his father *held* barred when presented to executor of deceased ten years after deceased had received $10,000 from his father's estate (Code Civ. Proc. § 337, subd. 1).

◆

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Juan Fuentez against Frank J. Hennessy, as executor of the estate of Walter H. Dupee, also known as W. H. Dupee, also known as Walter Hamlin Dupee, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Stephen F. Gallagher, of Anaheim, and Phillips & Munck, of Oakland, for appellant.

Frank E. Powers, of San Francisco, and Marchetti & Marchetti, of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal by plaintiff from a judgment in favor of the defendant executor in an action brought upon a rejected claim. The sole question raised on this appeal involves the propriety of the trial court's finding to the effect that the claim was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure.

The claim was based upon a written instrument executed in 1918 which reads as follows:

"W. H. Dupee
Santee
California.
"Oct. 29, 1918.

"I hereby agree to pay to Juan Fuentez the sum of Seventy five hundred dollars on the date I receive the amt. to be left to me by my father John Dupee providing I am unable to settle the amt due Juan Fuentez before my fathers death and in which case I would only be obliged to pay the amt which is $2700. to date.

"W. H. Dupee

"In case of Juan Fuentez death the above amt. stated is to be paid by me to any member of his family he may designate. In case of my death the amt shall come from my estate.

"W. H. Dupee."

The claim was presented and the action was commenced after the death of W. H. Dupee in 1933. It was alleged in the amended complaint that John Dupee, the father of W. H. Dupee, died in 1922 and that the amount due plaintiff had not been settled or paid at the time of the death of said John Dupee. It was further alleged that "said W. H. Dupee did not receive from his said father or from his father's estate, or in any manner whatsoever, any money or other property." This last-mentioned allegation was denied by the answer and it was affirmatively alleged that on November 23, 1923, $10,000 was distributed to said W. H. Dupee by the decree of distribution in the estate of said John Dupee and that on November 24, 1923, said sum was paid to said W. H. Dupee in full of his distributive share of said estate. It was also alleged in the answer that the claim was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure.

It will thus be seen that the question of whether the statute of limitations had run when the claim was presented in 1933 depends upon when the cause of action accrued. The uncontradicted testimony shows that W. H. Dupee received the sum of $10,000 in 1923 under the decree of distribution in his father's estate, and if the cause of action accrued at that time, then the claim was barred.

While appellant concedes that W. H. Dupee received said sum on November 24, 1923, and executed a receipt for $10,000 in full of his "distributive share of the said estate," he points to certain further facts and contends that the cause of action did not accrue at that time. It appears that said John Dupee did not will any property of any kind directly to said W. H. Dupee, but he did create a spendthrift trust from which said W. H. Dupee was to receive the income. It further appears that by consent of all parties involved in the probate proceedings, the probate court distributed said sum of $10,000 to said W. H. Dupee "as and for income accrued upon said estate during the administration thereof."

We are of the opinion that the cause of action upon said written instrument accrued when said W. H. Dupee received said sum of $10,000 under the decree of distribution in 1923 and that the trial court correctly concluded that the claim was barred by the statute of limitations when presented to respondent in 1933. The written instrument was an unusual one, but it is apparent that the parties intended to fix the time of payment for the time when it was contemplated that W. H. Dupee would be enabled to pay the sum agreed upon through distribution of his father's estate. That time arrived when W. H. Dupee received the $10,000 under the terms of the decree of distribution in 1923 and appellant could have brought an action upon said instrument at any time thereafter. No action was brought during the lifetime of W. H. Dupee and the claim was barred when presented to his executor approximately ten years after the cause of action had accrued.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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9 Cal.App.2d 426

BARR v. HALL et al.

Civ. 1390.

District Court of Appeal, Fourth District, California.

Oct. 9, 1935.

Appeal and error ⇨786, 1126

Motion to dismiss appeal or affirm judgment on ground that questions presented were so unsubstantial as to need no further argument, denied, where error in giving and refusal of certain instructions was urged, since questions raised necessitated examination of entire record (Const. art. 6, § 4½).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Phyllis Barr against J. Allan Hall and another. Judgment for plaintiff, and the named defendant appeals. On plaintiff's motion to dismiss appeal.

Motion denied.

J. Hampton Hoge, of San Francisco, and Chester O. Hansen, of Fresno, for appellant.

Claude Minard and Ray W. Hays, both of Fresno, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal or affirm the judgment on the grounds that the appeal was taken for delay only and that the questions presented are so unsubstantial as not to need further argument.

In the opening brief it is urged that the giving and refusal of certain instructions was erroneous in view of the evidence which had been presented. It is at once apparent that it will be necessary to examine the entire record, including the evidence. The opening brief raises at least one substantial question in the decision of which the court should have the assistance of the respondent. This is in effect conceded by the respondent, who filed a brief some months before this motion was made, and who argues, in support of the motion, that any error which may appear is not reversible under section 4½ of article 6 of the Constitution.

We have heretofore held that a motion of this character should not be granted where it appears that the case cannot be decided without going over the entire record, Brown v. Gow, 126 Cal. App. 113, 14 P.(2d) 322; and that it should not be used merely for the purpose of advancing the cause on the calendar, Lennon v. Woodbury, 1 Cal. App. (2d) 381, 36 P.(2d) 415.

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.

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9 Cal.App.2d 505

BRUCE v. RISLEY.

Civ. 1742.

District Court of Appeal, Fourth District, California.

Oct. 16, 1935.

Appeal and error 🔑763

Appellee's stipulation that order might be made allowing appellant to file supplementary opening brief to correct admitted deficiencies in brief on file *held* abandonment by appellee of prior motion to dismiss appeal or affirm judgment on ground that appellant failed to print in brief, or supplement thereto, any portion of typewritten record relied upon, or to state substance of record parenthetically (Code Civ. Proc. § 953c; Rules of the Supreme Court and District Courts of Appeal, rule 8).

◆

Appeal from Superior Court, Fresno County; E. N. Rector, Judge.

Action by A. Bruce against Thomas A. Risley. From a judgment, plaintiff appeals. On defendant's motion to dismiss the appeal or affirm the judgment, and on plaintiff's motion for an order permitting plaintiff to file a supplementary opening brief.

Plaintiff's motion granted, and defendant's motion denied without prejudice.

John D. Chinello and L. B. Fowler, both of Fresno, for appellant.

W. H. Stammer, of Fresno, for respondent.

MARKS, Justice.

Respondent has moved to dismiss this appeal or affirm the judgment on the ground that appellant has failed to print in his brief, or a supplement thereto, any portion of the typewritten record relied upon by him, or to state the substance of such record parenthetically, referring to the line and page of the transcript for verification, and other defects in such brief. Section 953c, Code Civ. Proc.; section 3, rule VIII, Rules of the Supreme Court and District Courts of Appeal.

Appellant has filed a motion for an order permitting him to file a supplementary opening brief to correct the admitted deficiencies in the one now on file. Counsel have stipulated that such order may be made.

We regard this stipulation as a virtual abandonment of the original motion to dismiss or affirm. Smith v. Wagner, 129 Cal. App. 694, 19 P.(2d) 250.

Appellant's motion for an order permitting him to file a supplementary opening brief is granted and thirty days is given him so to do.

Respondent's motion to dismiss the appeal or affirm the judgment is denied without prejudice to a renewal of the motion after the supplementary brief is filed if he be so advised.

We concur: BARNARD, P. J.; JENNINGS, J.

9 Cal.App.2d 314

WILLIAMS v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 9859.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1935.

1. **Justices of the peace 🔑149(1)**

Claimant, who filed verified third party claim to automobile seized under writ of attachment in action on note, *held* entitled to appeal from determination of justice's court that automobile did not belong to claimant, rendered as part of judgment in action on note, since claimant's property rights were adversely affected by judgment (Code Civ. Proc. § 689, as amended in 1935, and § 974).

2. **Mandamus 🔑57(1)**

Mandamus *held* to lie to compel superior court to proceed with hearing of appeal from determination of justice's court denying claim of ownership of attached automobile, where claimant was entitled to maintain appeal, and superior court erroneously dismissed appeal on ground that court had not acquired jurisdiction thereof.

◆

Petition for a writ of mandamus by Rozelle L. Williams against the Superior Court of the State of California in and for the County of Alameda to compel the Superior Court to hear and determine an appeal.

Peremptory writ issued.

Prior opinion 48 P.(2d) 726.

Dunn, White & Aiken, of Oakland, for petitioner.

McClymonds, Wells & Wilson, of Oakland, for respondent.

KNIGHT, Justice.

Pursuant to a writ of attachment issued out of the justice's court of Brooklyn township in Alameda county in an action brought by A. S. Downing against L. C. Chambers to recover on a promissory note, the sheriff of said county seized an automobile of which the petitioner herein, Rozelle L. Williams, claimed to be the owner. Thereafter and in conformity with the provisions of section 689 of the Code of Civil Procedure, the latter served upon the sheriff a verified third party claim to the automobile, and the sheriff exacted from Downing an indemnifying undertaking in a sum equal to double the value of the property levied upon. Downing then petitioned the justice's court as provided in said Code section to hear and determine the question of title to the automobile. Such a hearing was had at which all parties interested were present, and thereafter, Chambers having defaulted, the justice's court rendered its judgment declaring Chambers to be the owner of the automobile, and that Downing, the plaintiff in the action, do have and recover from Chambers, the amount sued for on said promissory note. Mrs. Williams took an appeal to the superior court on questions of both law and fact, which Downing moved to dismiss; and on April 4, 1935, the motion was denied. About a week later, however, the respondent superior court of its own motion made an ex parte order vacating its previous order and granted said motion. Accordingly the appeal was dismissed. Thereupon petitioner instituted the present proceeding in mandamus to compel the superior court to set aside its order of dismissal and to hear and determine the appeal.

[1] We are of the opinion that petitioner was entitled to maintain the appeal. Section 974 of the Code of Civil Procedure provides: "Any party dissatisfied with the judgment rendered in a civil action in a * * * justice's court, may appeal therefrom to the superior court * * *. The notice [of appeal] must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact or both." In the final judgment rendered in the present action the justice's court adjudged, among other things, that the property "described in the 3rd party claim of Mrs. Rozelle L. Williams was the property of L. C. Chambers, defendant," thereby making petitioner a party to the judgment, which by its terms adversely affected the title to property of which she claimed to be the owner; and that being so, her status, in our opinion, fell within the meaning of the opening clause of said section 974, granting to "Any party dissatisfied with the judgment" a right of appeal therefrom.

The argument advanced in behalf of the respondent is that legally the result of the determination of the question of title to personal property by a justice's court pursuant to the provisions of said section 689 does not constitute part of the judgment; that said section contemplates a separate summary proceeding, the result of which is not res judicata; and that since the Code does not specifically provide an appeal from such an adjudication, the sole remedy of an aggrieved third party claimant is by way of an action for conversion. There is no language used in said section 689 implying, however, that such adjudication may not be embodied in the judgment, nor has respondent cited any cases so holding; and it would seem to follow that where it is embraced within and made part of the judgment, a right of appeal therefrom is available under the broad terms of the opening clause of said section 974.

It is further contended in support of the dismissal that in any event the adjudication of title in the present case was not made part of the judgment. The entries in the justice's docket, which are controlling in the matter, do not in our opinion sustain this contention. It appears therefrom that all issues involved in the case were disposed of by the justice on the same day, December 7th; that the words "It is the judgment of the court" preceded the entry of the adjudication of title, which was followed by the adjudication of the indebtedness sued upon, thereby constituting one entire judgment.

Finally, on this point, it may be stated that the uncertainty which has heretofore existed as to whether an appeal lies from a justice's court adjudication of a third party claim to property seized under attachment or execution has been done away with entirely by a 1935 legislative revision of section 689, which now provides, among other things, that "an appeal lies from any judgment determining title under this section, such appeal to be taken in the manner provided for appeals from the court in which such proceeding is had."

[2] Nor do we find any merit in respondent's remaining point, that the erroneous action of the superior court dismissing the appeal can be reached only on certiorari, and cannot be corrected by mandamus. As held in the case of Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978, mandamus will lie to compel a superior court to proceed with the hearing of a justice's court appeal, when properly taken, and the superior court has erroneously dismissed the same upon the ground that it had not acquired jurisdiction thereof.

Upon the grounds and for the reasons stated, it is ordered that the peremptory writ issue herein as prayed.

We concur: TYLER, P. J.; CASHIN, J.

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9 Cal.App.2d 441

GRANDY v. SOUTHERN PACIFIC CO. et al.

Civ. 10405.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1935.

Rehearing Denied Nov. 5, 1935.

Hearing Denied by Supreme Court Dec. 9, 1935.

1. Appeal and error 🔑927(7)

On appeal from judgment in favor of defendant entered after trial court granted defendant's motion for directed verdict, evidence should be viewed most favorably to plaintiff.

2. Railroads 🔑327(3)

Pedestrian who approached railroad track with knowledge of presence of box car, and who would not have been injured had he used ordinary care for his safety and looked at any time after turning into street in which railroad track was located and before stepping on track, *held* guilty of contributory negligence as matter of law.

3. Appeal and error 🔑1032(2)

Prejudicial error will not be presumed in ruling of trial court sustaining objection to introduction of evidence, but must be made to appear affirmatively in record.

4. Appeal and error 🔑205

Ruling sustaining objection to question which does not of itself indicate that answer will be favorable to litigant seeking to introduce testimony will not be reviewed by District Court of Appeals unless offer of what is proposed to be proved was made at trial court so as to enable District Court of Appeals to determine if the proposed evidence would have been material and beneficial to litigant seeking to introduce testimony.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Arthur M. Grandy against the Southern Pacific Company and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Albert J. Morrissey and Paul Blackwood, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of defendant entered after the trial court granted defendant's motion for a directed verdict.

[1] Viewing the evidence most favorably to plaintiff (Newson v. Hawley, 205 Cal. 188, 189, 270 P. 364), the facts in the instant case are:

That plaintiff was struck by a box car propelled by a switch engine which was backing across a driveway sidewalk on a curve in a northeasterly direction on Alameda street in the city of Los Angeles. Plaintiff was pursuing a route, customarily followed by him over a period of five years, west on Bay street to the intersection of Bay and Alameda streets and thence north on Alameda street. He had on numerous occasions observed the switching of trains over the driveway sidewalk.

There was no watchman or flagman at the crossing, although it was a rule and custom of the company to have a flagman on duty when the crossing was being used by trains. No warning signal of any sort was given by the train crew.

Plaintiff, while walking in a westerly direction on Bay street and about twelve to fifteen feet from Alameda street, observed to his left, standing still, a box car in Alameda street on the "coach yard lead." He continued to walk in a westerly direction to the intersection of Bay and Alameda streets, at which point he again observed the box car in the same place as before, standing still. He then turned and walked in a northerly direction on Alameda street for approximately 30 feet, at which point he was struck in the back by defendant's box car. The last 8 or 10 feet of plaintiff's course was traversed on defendant's track between the rails. From the time plaintiff turned north on Alameda street until he was struck he did not again look to see if the box car was in motion.

Plaintiff claims that the trial court erred in granting a motion for a directed verdict, for the reason that the above facts did not as a matter of law constitute contributory negligence.

[2] We have reviewed the evidence and are of the opinion that reasonable men could draw only one conclusion from it, namely, an inference pointing unerringly to the fact that, had plaintiff used ordinary care for his safety and looked at any time, after turning north on Alameda street and before stepping on the railroad track, at the box car, which he knew was behind him, the accident would have been prevented and he would not have been injured. Plaintiff was therefore guilty of contributory negligence as a matter of law, and the motion for a directed verdict was properly granted.

This is in accord with the view of our Supreme Court in the case of Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175. Mr. Justice Melvin, speaking for the court, says at page 624 of 169 Cal., 149 P. 175, 177: "A person approaching a railway track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen. Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but where, as here, the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury. Hamlin v. Pacific Electric Ry. Co., 150 Cal. [776], 779, 89 P. 1109."

In Green v. Los Angeles Terminal Railway Co., 143 Cal. 31, 45, 76 P. 719, 101 Am. St. Rep. 68, Mr. Justice Lorigan quotes with approval from Olson v. Northern Pacific Ry. Co., 84 Minn. 258, 87 N. W. 843, 844, a case wherein the deceased was killed while attempting to cross a railroad track. The court said:

"We are unable to find in the record any excuse for intestate's disregard of his obvious duty to himself to use his eyesight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track.

"Until then he had full control of his movements. He could, by the slightest movement of his head towards the east, have discovered his hazard, and by the slightest check in his movements have avoided the same. Under such circumstances his obvious want of care must preclude a recovery in this case."

To the same effect are Koch v. Southern California Railway Co., 148 Cal. 677, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795; Pietrofitta v. Southern Pacific Co., 107 Cal. App. 575, 290 P. 597; Walker v. Southern Pacific Co., 38 Cal. App. 377, 176 P. 175; Jansen v. Southern Pacific Co., 5 Cal. App. 12, 89 P. 616. An examination of the cases cited by plaintiff will reveal that each is distinguishable on its facts from the case before this court.

Plaintiff was called and sworn as a witness, and testified that during a period of five years he had on probably ten occasions seen cars and switch engines backing over the driveway sidewalk crossing, where the accident occurred. He was then asked: "Now at those times, would there or would there not be any person down there at the crossing?"

[3] Objection being interposed to the question, it was sustained. This ruling plaintiff asserts was prejudicial error. Prejudicial error will not be presumed in a ruling of the trial court sustaining an objection to the introduction of evidence. If error is alleged to exist, it must be made to appear affirmatively in the record. Snowball v. Snowball, 164 Cal. 476, 480, 129 P. 784; County of Sonoma v. Hall, 129 Cal. 659, 662, 62 P. 213; Marshall v. Hancock, 80 Cal. 82, 83, 22 P. 61.

[4] Where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal by this court, an offer of what is proposed to be proven must first be made to the trial court, so that this court can determine whether the proposed evidence would have been material and beneficial to the party offering the evidence. County of Sonoma v. Hall, 129 Cal. 659, 662, 62 P. 213; Marshall v. Hancock, 80 Cal. 82, 84, 22 P. 61; Whitelaw v. Whitelaw, 122 Cal. App. 260, 263, 9 P.(2d) 874.

There was nothing in the question asked to indicate the answer, nor was any offer of proof made which even indicated that counsel expected an affirmative answer to the question. Snowball v. Snowball, 164 Cal. 476, 480, 129 P. 784. Therefore the record fails to show any error in this ruling.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 307

O'HAIR v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 9771.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1935.

Rehearing Denied Oct. 30, 1935.

Hearing Denied by Supreme Court Nov. 29, 1935.

1. Limitation of actions 🔑48(4)

Action commenced in 1931 to recover on bond executed in 1922 to obtain release of attachment was not barred by four-year limitation statute where action was brought within four years after execution was issued and returned unsatisfied in 1928 (Code Civ. Proc. §§ 337, 540).

2. Limitation of actions 🔑48(4)

Right of action upon bond given to obtain release of attachment accrues when execution is returned unsatisfied (Code Civ. Proc. §§ 540, 552).

3. Limitation of actions 🔑66(15)

Running of statute of limitations cannot be definitely suspended by unreasonably delaying the making of a demand or the doing of some other act.

4. Limitation of actions 🔑65(2)

Judgment creditor, who issued execution shortly after judgment obtained in 1923 in action in which bond to obtain release of attachment was executed in 1922 became final, issued execution in "reasonable time" within rule that making of demand or doing of other act necessary to starting of running of limitations statute must be made in "reasonable time," so that action on bond commenced within four years after execution was returned unsatisfied was not barred by four years' limitations statute (Code Civ. Proc. §§ 337, 540, 552).

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by D. L. O'Hair, as administrator of the estate of P. E. O'Hair, deceased, against the United States Fidelity & Guaranty Company. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Horace W. B. Smith and Theodore Tamba, both of San Francisco, for appellant.

Alma M. Myers, of San Francisco, for respondent.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

SPENCE, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff. The action was one brought upon a bond given under section 540 of the Code of Civil Procedure.

Said bond was executed in 1922 to obtain the release of an attachment in an action entitled P. E. O'Hair v. Pacific City, a corporation. Judgment was entered in favor of the plaintiff in that action on September 7, 1923. Defendant therein took an appeal, but no undertaking on appeal was filed. Shortly thereafter the plaintiff in said action died. In 1927, plaintiff herein was appointed administrator of the estate of P. E. O'Hair and was substituted as plaintiff in the action above mentioned. In 1928, the appeal in said action was dismissed and shortly thereafter execution was issued and returned unsatisfied. In 1931, the plaintiff commenced this action to recover upon said bond.

[1, 2] It is the contention of appellant that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure, but in our opinion this contention cannot be sustained. It is well settled that ordinarily the right of action upon such bond accrues when execution has been returned unsatisfied (Code Civ. Proc., § 552; Hutchinson v. United States, etc., Co., 58 Cal. App. 573, 209 P. 249; Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 P. 416), and in the present case, the action was commenced within four years after that time.

Appellant points out, however, that no undertaking on appeal was filed in the other action, and respondent and his predecessor could have caused execution to be issued at any time after the entry of judgment in 1923. Hutchinson v. United States, etc., Co., supra. Appellant then argues that the cause of action on the bond is barred as respondent and his predecessor delayed the issuance of execution for an unreasonable length of time. In our opinion appellant's position cannot be sustained.

[3] Our attention has not been called to any authorities directly in point, but appellant relies upon numerous authorities, applying the principle set forth in Williams v. Bergin, 116 Cal. 56, at pages 60 and 61, 47 P. 877, 879. This principle has been stated in varying terms in the several cases cited, but it is generally based upon the proposition that no one can suspend the running of the statute of limitations indefinitely and thereby defeat its purpose by unreasonably delaying the making of a demand or by unreasonably delaying the doing of some other act. In Williams v. Bergin, supra, 116 Cal. 56, at page 61, 47 P. 877, 879, it is said: "What is a reasonable time will depend upon the circumstances of each case. A party cannot by his own negligence, or for his own convenience, stop the running of the statute."

[4] We are of the opinion that under the facts before us the issuance of execution was had within a reasonable time, as execution was issued almost immediately after the judgment became final. It is true that in the absence of the filing of an undertaking on appeal, respondent and his predecessor could have caused the issuance of execution before the cause was finally determined, but they were not negligent in failing to do so, nor can it be said that the delay was merely for their own convenience. Satisfaction of a judgment is not ordinarily sought by execution until after the judgment becomes final, and a judgment creditor should not be compelled at his peril to seek satisfaction by execution before obtaining a final judgment, and he should not be prejudiced in his rights by his failure to do so. While the rule for measuring a "reasonable time" as stated in Jenkins v. Marsh, 22 Cal. App. 8, 132 P. 1051, 1052, is applicable to cases "Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default," we find nothing in any of the authorities cited which indicates that such rule should be extended to cover the facts before us. We are therefore of the opinion that the trial court correctly concluded that respondent's cause of action was not barred.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

STAPLES v. ZOPH.

Civ. 10461.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1935.

Hearing Denied by Supreme Court
Dec. 5, 1935.

1. Limitation of actions ⚿99(1)

Statute of limitations is not tolled by fraudulent concealment of defendant's identity (Code Civ. Proc. § 340, subd. 3, and § 474).

2. Limitation of actions ⚿104(2)

Concealment of identity of party liable cannot be deemed same as concealment of cause of action, as regards running of statute of limitations (Code Civ. Proc. § 340, subd. 3, and § 474).

3. Limitation of actions ⚿31

Where allegedly libelous letters were published September 15 and 16, 1932, and defendant's identity was concealed until June 3, 1934, which was a Sunday, complaint filed on June 4, 1934, *held* barred by statute of limitations since statute was not tolled by concealment of defendant's identity, especially where plaintiff could have filed suit within one year after accrual of cause of action by naming fictitious defendant (Code Civ. Proc. § 340, subd. 3, and § 474).

◆

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Blanche Staples against Leanor Zoph. From a judgment for defendant, plaintiff appeals.

Affirmed.

Mark S. Feiler and Roy W. Colegate, both of Los Angeles, for appellant.

William B. Beirne, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendant after the trial court sustained an objection to the introduction of any evidence on the ground that the cause of action alleged in the amended complaint was barred by section 340, subd. 3, of the Code of Civil Procedure.

The amended complaint attempts to state a cause of action for libel of plaintiff by defendant, the alleged libelous letters having been published on September 15, 1932, and September 16, 1932, respectively; also that defendant had fraudulently concealed her identity until June 3, 1933. June 3, 1934, was a Sunday. The complaint was filed on June 4, 1934. If the statute of limitations was tolled by the concealment of defendant's identity, plaintiff was in time in filing her suit on the 4th of June, 1934. Tilden Lumber Co. v. Perino, 2 Cal. App. (2d) 133, 37 P.(2d) 466.

The sole question presented for determination is: Did the fraudulent concealment by defendant of her identity toll the running of the statute of limitations?

[1] The statute of limitations is not tolled by the fraudulent concealment of defendant's identity. Proctor v. Wells Bros. Co. of New York, 181 Ill. App. 468, 471; Gale v. McDaniel. 72 Cal. 334, 335, 13 P. 871.

[2] Plaintiff relies principally upon the decision in Kimball v. Pacific Gas & Electric Co., 220 Cal. 203, 30 P.(2d) 39. The line of demarcation between the decision in Kimball v. Pacific Gas & Electric Co. and the instant case is this: In Kimball v. Pacific Gas & Electric Co. there was a fraudulent concealment of a fact relating to the cause of action, while in the case at bar, the fraudulent concealment was of the identity of defendant. Concealment of the identity of the party liable cannot be deemed the same as concealment of a cause of action. Proctor v. Wells Bros. Co. of New York, 181 Ill. App. 468, 471. This distinction is recognized in Kimball v. Pacific Gas & Electric Co., supra, wherein the court cites Gale v. McDaniel, supra, and points out that in the case then before the court there was a fraudulent concealment by the defendant of a fact pertaining to the cause of action, while in Gale v. McDaniel, supra, ignorance of the identity of the defendant did not toll the statute of limitations. Kimball v. Pacific Gas & Electric Co., 220 Cal. 203, 213, 30 P.(2d) 39.

[3] This rule does not operate unjustly to plaintiff, since at any time within one year after accrual of her cause of action she could have filed suit naming a fictitious defendant. Code Civ. Proc. § 474.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 290

CARTER v. SOUTHERN PAC. CO.

Civ. 10397.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1935.

Hearing Denied by Supreme Court Nov. 11, 1935.

Carriers ⚷200

Superior court was not empowered to review or annul order of railroad commission awarding refund of freight charges found to be in excess of reasonable rates, since commission's order in reparation case is reviewable only by Supreme Court (St. 1915, p. 164, § 71 (a, b), as amended by St. 1931, p. 1687).

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by E. T. Carter against the Southern Pacific Company. From a judgment for the defendant, the plaintiff appeals.

Judgment reversed, with directions.

F. W. Turcotte, of Los Angeles, for appellant.

Laselle Thornburgh, of Santa Barbara, and J. E. Lyons and Burton Mason, both of San Francisco, for respondent.

Ira H. Rowell, Roderick B. Cassidy, and Frank B. Austin, all of San Francisco, amici curiæ.

GOULD, Justice pro tem.

Availing himself of section 71(a) of the Public Utilities Act of the State of California (Stats. 1915, pp. 115, 164, as amended by St. 1931, p. 1687), plaintiff applied to and obtained from the railroad commission a reparation award ordering defendant to refund to plaintiff certain freight charges in the aggregate sum of $431.79, found by the commission to have been in excess of the reasonable rates for gravel hauled from Fillmore, Ventura county, to certain Santa Barbara county points. As to this award no application was made to the railroad commission for a rehearing and no petition was made to the Supreme Court for a writ of review.

When defendant failed to make payment of the award, plaintiff filed this suit to recover judgment for the same, following the permissive language of section 71(b) of the Public Utilities Act. Defendant sought to avoid the award upon the ground that the rates under consideration by the commission were not excessive, that such rates had theretofore in other railroad commission proceedings been found to be reasonable, and that therefore the commission acted in excess of its jurisdiction in making any reparation award. Submitted upon an agreed statement of facts, the case was decided by the trial court in conformity with defendant's contention, and plaintiff appeals.

We are of the opinion that judgment should have been rendered for plaintiff. The superior court has no power to review or annul the order of the railroad commission involved herein. Pacific Telephone Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. As provided in the Public Utilities Act, the remedy of defendant, if dissatisfied with the commission's order, was to seek a rehearing or apply to the Supreme Court for a writ of certiorari. And it makes no difference, so far as we can determine, whether the proceeding to fix the reparation award be regarded as judicial, quasi-judicial, administrative, or legislative. The order of the commission, however it be designated, is reviewable only by the Supreme Court; and in fact that procedure has the implied sanction of such court in its review of reparation cases. Los Angeles & Salt Lake R. Co. v. Railroad Commission, 207 Cal. 123, 277 P. 324; Atchison, T. & S. F. R. Co. v. Railroad Commission, 212 Cal. 370, 298 P. 991.

The judgment is reversed, with directions to the trial court to enter judgment in favor of plaintiff in the sum of $431.79, together with interest as prayed, and to hear and determine the prayer of the complaint for exemplary damages; appellant to recover his costs on this appeal.

We concur: CRAIL, P. J.; WOOD, J.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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9 Cal.App.2d 16

MORROW et al. v. SUPERIOR COURT IN AND FOR KINGS COUNTY et al.

Civ. 1725 (4).

Supreme Court of California.

Oct. 14, 1935.

1. Parties ⚷51(1)

Where complete determination of controversy cannot be had without presence of other parties, Civil Code requirement that other parties be brought in is mandatory (Code Civ. Proc. § 389).

2. Parties ⚷51(2)

Action to determine adverse claims between plaintiff and named defendants in which court did not assume control of res, the property, or undertake to determine its ownership against all the world, could be determined without prejudice to rights of another party, and court could proceed without bringing in such other party (Code Civ. Proc. § 389).

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Application for a writ of prohibition by J. E. Morrow and others against the Superior Court in and for Kings County and others to restrain the court from proceeding with the trial of an action until a certain party is made defendant.

Writ denied.

Prior opinion, 48 P.(2d) 188.

John Douglas Short and Keyes & Erskine, all of San Francisco, Everts, Ewing, Wild & Everts, Wakefield & Hansen, and Harris, Willey, Griffith & Harris, all of Fresno, M. G. Gallaher, of Los Angeles, T. M. Stuart, of San Francisco, and David E. Peckinpah and Shepard & Shepard, all of Fresno, for petitioners.

William M. Cannon, McCutchen, Olney, Mannon & Greene, and Edwin S. Pillsbury, all of San Francisco, for respondents.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, amici curiæ.

PER CURIAM.

The petition for hearing is denied.

[1] In denying the petition for hearing in the Supreme Court, after decision by the District Court of Appeal, we think it appropriate to say that the record fails to show that there will be any excess of jurisdiction of respondent court in proceeding, as it threatens to proceed in the action, while at the same time it refuses to grant the motion of petitioners to order the Medallion Oil Company brought in as party defendant. If the trial court had found, or the record indisputably showed, that "a complete determination of the controversy cannot be had without the presence of other parties" (section 389, Code Civ. Proc.), then the provisions of the cited section 389 would be mandatory. This court has held that in such case the question would become one of jurisdiction, in that the court would be without authority to proceed without bringing in said party, and that if, nevertheless, it assumed to do so, it could be subjected to the prohibitory writ quousque, that is to say, until the performance of a certain act, or the happening of a certain event—in this case the bringing in of said party, Medallion Oil Company. Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445.

[2] But here the court did not find, and the record does not indisputably show, that in the pending action in the court below the controversy cannot be completely determined without the presence of Medallion Oil Company. In that action the court has not assumed control of the res, the property, or undertaken to determine its ownership against all the world. The action is simply one to determine adverse claims as between the plaintiff and the named defendants. While in such an action additional parties ordinarily may be brought in so as to include a settlement of their adverse claims, it is not our view that the controversy now before the court between the original parties may not be determined without prejudice to the rights of the oil company. Certainly those rights might be determined and the decree so drawn that it will save the rights, if any, of the excluded party. On the facts appearing, the question is not one of jurisdiction, and the court has jurisdiction to proceed without bringing in such party if in its discretion it shall decide upon that as the proper course.

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4 Cal.2d 443

NORTON v. BARANOV et al.

L. A. 15054.

Supreme Court of California.
Oct. 10, 1935.

1. Courts 🔑472(7)

Superior court *held* without jurisdiction of action for $400, where both class A justice's court and municipal court were located in county in which action was brought.

2. Appearance 🔑17

Appearance of defendant in action for $400 brought in superior court which was without jurisdiction of subject-matter *held* insufficient to confer jurisdiction on court.

3. Appearance 🔑17
Courts 🔑24

Jurisdiction of subject-matter of action cannot be conferred by appearance or consent.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Thomas S. Norton, Jr., against Nathan F. Baranov and another, copartners, doing business under the firm name of Baranov & Bennett. From an order denying a motion to set aside judgment for plaintiff for lack of jurisdiction, the defendants appeal.

Reversed and remanded, with directions.

For prior opinion, see 35 P.(2d) 640.

Alvin B. Baranov, of San Diego, for appellants.

Head, Wellington & Jacobs and H. C. Cameron, all of Santa Ana, and Frank Mergenthaler, of Los Angeles, for respondent.

WASTE, Chief Justice.

[1-3] Plaintiff brought this action in the superior court of Los Angeles county against the defendants, residents of the city of San Diego, to recover the sum of $400 for services rendered in the city of San Diego. The defendants appeared and answered. Judgment was entered for the plaintiff. The defendants subsequently moved to set aside the judgment for an asserted lack of jurisdiction in the superior court to entertain the action. The motion was denied, and defendants appealed from the order.

A decision on the question thus presented will be found in the revision of the various provisions of the Code of Civil Procedure relating to civil proceedings in municipal courts, title 10a, and proceedings in justices' courts, title 11, adopted by the Legislature in 1933 (St. 1933, p. 1836) on recommendation of the California Code Commission.

The order must be reversed. Had there been no class A justice's court and no municipal court in Los Angeles county, the case would properly have gone to the superior court; but there are both kinds of these inferior courts in the county. As a result, jurisdiction of the cause is in either the municipal court or in a class A justice's court in the county. The appearance of the defendants in the superior court of Los Angeles county did not confer jurisdiction on that court. Jurisdiction of the subject-matter of an action cannot be conferred by appearance or consent. Van Horn v. Justice's Court, 216 Cal. 235, 242, 13 P.(2d) 704, and cases cited.

The Code (Code Civ. Proc. § 396, as added by St. 1933, p. 1841) provides that if an action is commenced in a court which lacks jurisdiction of the subject-matter, if there is a court in this state which has such jurisdiction, the action shall not be dismissed, but shall be transferred to a court having jurisdiction. The parties may in writing or in open court agree to the transfer to such proper court. Code Civ. Proc. § 398, as amended by St. 1933, p. 1843.

The order denying the motion to vacate and set aside the judgment rendered in the superior court for lack of jurisdiction is reversed. The cause is remanded to the court below with directions to entertain and dispose of such proceedings as will permit a transfer of the cause to the proper court.

We concur: SHENK, J.; SEAWELL, J.; LANGDON, J.; THOMPSON, J.; CONREY, J.; CURTIS, J.

UMEMOTO v. McDONALD et al.[*]

Civ. 10491.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1935.

Hearing Granted by Supreme Court Dec. 16, 1935.

1. Automobiles 🔑244(6)

In action for death of plaintiff's daughter, who was killed by truck while crossing intersection which was within 90 to 100 feet of crosswalk, of which driver of truck had unobstructed view when deceased left curb, evidence *held* sufficient to support judgment for plaintiff.

2. Witnesses 🔑393(6)

Impeaching question need show only such part of former testimony of witness as is inconsistent with present testimony.

3. Appeal and error 🔑1048(7)

In action for death of plaintiff's daughter, who was killed by truck while crossing intersection, exclusion of impeaching question as to witness' previous statement before coroner's jury as to position of deceased in street at time of accident because of omission from quoted statement of phrase, "Maybe she was trying to get away," *held* prejudicial error, since omitted matter was pure conclusion and evidence was directed at gravamen of plaintiff's case.

[*] For subsequent opinion see 58 P.2d 1274.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Mitsuo Umemoto against Archie Burns McDonald and another. From a judgment for plaintiff, the named defendant appeals.

Reversed.

Lasher B. Gallagher, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment for the respondent after trial by a jury in an action brought to recover damages for the wrongful death of respondent's minor daughter. Appellant was the driver of a truck which caused personal injuries to deceased, as a result of which she died.

Viewing the evidence most favorably to respondent (Ah Gett v. Carr, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant case are:

Respondent's daughter, age 17, stepped into the crosswalk at the intersection of Lexington and Valley boulevard in the city of El Monte, Cal. At this intersection Valley boulevard runs in an east and west direction. Lexington avenue intersects with it on the south side. On the day of the accident there was a designated pedestrian crosswalk 12 feet in width extending from the south curb line to the north curb line of Valley boulevard.

Appellant was driving a ten-ton truck and trailer, traveling at a speed of from 10 to 12 miles per hour, in a westerly direction on Valley boulevard, 90 to 100 feet east of the crosswalk at the moment the deceased left the curb. His view of the crosswalk was unobstructed, and he first saw deceased when she was approximately one-third of the way across the boulevard and in the crosswalk. Deceased proceeded in a northerly direction toward the north side of Valley boulevard. According to the testimony of Taduko Midukami, she being the only witness so stating, *the left front of appellant's truck struck deceased while she was in the north half of Valley boulevard. She also testified that decedent had shortly before left the crosswalk, running in a northwesterly direction.*

Defendant relies for reversal of the judgment on two propositions:

First. That the deceased was guilty of contributory negligence as a matter of law.

Second. It was prejudicial error for the trial court to sustain an objection to an impeaching question asked the witness Taduko Midukami, on the ground that the question as framed did not include a pure conclusion of the witness, which accompanied the prior alleged inconsistent statement of fact.

[1] As to appellant's first contention, we have examined the record and are of the opinion there was sufficient evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict in favor of respondent was necessarily predicated. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Koeberle v. Hotchkiss (Cal. App.) 48 P.(2d) 104.

[2, 3] Appellant's second proposition predicates prejudicial error on the trial court's ruling in sustaining an objection to an alleged impeaching question asked the witness Taduko Midukami. It is solely from this witness' testimony that respondent claims the jury could properly have found *that the decedent was in the crosswalk and in the north half of Valley boulevard at the time she was struck by defendant's truck.*

At the coroner's inquest this same witness testified relative to the position of the deceased just prior to the accident in part as follows:

"Q. How far out in the street was she when you first saw her? A. Almost across.

"Q. Was she out of the pedestrian lane at the time? A. I don't know. I couldn't see, but I think she was; *maybe she was trying to get away.*"

The impeaching question included all of the alleged contradictory statements of the witness as quoted above given at the coroner's inquest, but omitted the portion of the witness' answer which is italicized supra, to wit, *"maybe she was trying to get away."* The trial court based its ruling in sustaining the objection on the ground that the question as framed did not include the entire prior statement of the witness. The impeaching question need show only such part of the former testimony of the witness as is inconsistent with the present testimony. Moore v. Re, 131 Cal. App. 557, 560, 22 P.(2d) 45; 70 Cor. Jur. 1135. The portion of testimony omitted was a pure conclusion of the witness and it was thus unnecessary to include it in the question. The ruling was therefore erroneous. This evidence was directed at the very gravamen of plaintiff's case; it cannot be doubted that the failure to permit appellant to impeach the witness on such a vital point was prejudicial error. Starr v. Los Angeles Ry. Corporation, 187 Cal. 270, 282, 201 P. 599.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 374

In re OLSEN'S ESTATE (two cases).

HUNSINGER et al. v. LANDGREN et al.

SIMONSEN et al. v. SAME.

Civ. 9884, 9896.

District Court of Appeal, First District,
Division 2, California.

Oct. 7, 1935.

Rehearing Denied Nov. 6, 1935.
Hearing Denied by Supreme Court
Dec. 5, 1935.

1. Wills 🔑449

Fact that testatrix made will raised presumption of her intention to dispose of all her property.

2. Wills 🔑448

In construction of will, whenever disputed word or phrase may be reasonably given more than one meaning, meaning will, if possible, be given which will prevent intestacy.

3. Wills 🔑457

In will construction, nontechnical meaning may be given to technical words where will was drawn solely by testatrix and she was not familiar with technical terms.

4. Wills 🔑466

In holographic will drawn by testatrix who was of foreign birth and was unfamiliar with use of technical terms and with English language, devise of all my "personal property" included all property, real and personal, not otherwise disposed of in will, since such construction of words prevented partial intestacy and carried out evident intent of testatrix.

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

5. Wills 🔑587(1)

Where holographic will made certain bequests and contained bequest of "all my personal property," which was construed as meaning all testatrix' property, previous specific bequests were exceptions to general gift rather than inconsistent with it, and general bequest was in nature of residuary clause.

6. Evidence 🔑43(1)

It is matter of common knowledge that preliminary order for decree of distribution is customarily entered in minute book and thereafter separate instrument is customarily signed by judge, filed, and copied at length into minute book.

7. Executors and administrators 🔑314(12)

Order in minute book, which was preliminary order for decree of distribution, *held* not appealable.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding in the matter of the estate of Franciska G. Olsen, also known as Frances G. Olsen, deceased. A decree of distribution was entered and Julia Hunsinger and others and Stina Simonsen and others separately appeal.

Appeal from minute order dismissed and decree of distribution and amended decree of distribution reversed with directions.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Carl W. Mueller, of San Francisco, for appellants Julia Hunsinger et al.

George M. Thomas, of San Francisco, for appellant Mary C. Beach, etc.

Louis R. Mercado, Jr., of San Francisco, for appellants Frieda Theis et al.

A. B. Weiler and Otto A. Hoecker, both of San Francisco, for appellants Stina Simonsen et al.

H. W. Hutton, of San Francisco, for respondents.

SPENCE, Justice.

After the hearing on the petition for a decree of final distribution, the following minute order was entered by the clerk on August 9, 1934: "Heretofore submitted. Petition Helena Landgren, for Distribution. Granted to Helena Landgren, Katie McDonald and Mrs. Hertel." Thereafter findings of fact and conclusions of law and a decree of distribution were signed and filed. Five days after the filing of the decree of distribution an amended decree of distribution was signed and filed. Appeals were taken by two groups of appellants. One group of appellants appealed from the amended decree of distribution. The other group of appellants appealed from the minute order of August 9, 1934, from the decree of distribution, and from the amended decree of distribution. Said appeals have been consolidated upon stipulation of the parties.

All of the appellants contend that the court erred in construing the will of the deceased and in distributing all of the property thereunder to the respondents Helena Landgren, Katherine McDonald, and Margaret Hertel. In our opinion this contention must be sustained and we shall therefore first discuss the construction placed upon said will by the court.

It was an holographic will which read as follows:

"San Francisco April 26th 1925

"In the Event of my death. I give and bequeath to Katie Krebb the Stock in the Tamalpais bank in San Rafail (the Mony in the Ithalien American bank.) the San Francisco Saving and Loan Society bank 526 California St to my Broder Ludwig Gramlich Valtin Gramlich son Waldhausen Amt Buchen Baden Germany Mrs. Julia Hunsinger 44 Bismark St. Ludwigshafen. A Rh. Germany Anna Neufeld Meckenheim. Past Hasloch Germany. to Frank Theis $250/= Erick Theis $250/= Walter Rothschild $250/00 Jenneth Landgren $250/00 the Children of Frank Gramlich $500/00. to Mamie Eber Beach. Hellena Landgren and Katie McDonald all my bonds alike after all my bills are paid. to Hellen Landgren Katie McDonald Her Sister Mrs. Hertel all my personal property I have to do as the liek the Executor of this my last will and Testament with out bonds. and hereby revok all former wills by me made

"Francis G. Olsen

"(Witness) Florence L. Rothschild."

A photostatic copy of said will is before us. The will is legibly written, but it is manifest that the testatrix, who was of foreign birth, was not particularly familiar with the English language and that she knew little of sentence structure, punctuation, spelling, and the use of capitals. It is also apparent that she was not familiar with the proper use of technical terms.

There is no dispute concerning the identity of the persons named in the will, who were as follows: Katie Krebb, a grandniece; Ludwig Gramlich, a brother; Valtin Gramlich, a nephew, whose correct name was Franz Valentin Gramlich, residing at Waldhausen, Amt Buchen, Baden, Germany; Julia Hunsinger, a sister; Anna Neufeld, a sister; Frank Theis, Erick Theis, Walter Rothschild, and Jenneth Landgren, whose relationship, if any, to the testatrix does not appear; the children of Frank Gramlich, a nephew; Mamie Eber Beach, a niece; Helena Landgren, a niece of the deceased husband of the testatrix; Katherine McDonald, a niece; and Margaret Hertel, a niece. It is further conceded by all parties that the words "to do as the liek" appearing near the end of the will were intended as "to do as they like."

The court found "that said testatrix, Franciska G. Olsen, also known as Frances G. Olsen, in and by the following language in her said last will, the said language being clear and distinct and absolutely irreconcilable with the former parts of said will and in the last part of said will, to-wit: 'to Hellen Landgren Katie McDonald Mrs. Hertel all my personal property I have to do as the liek' intended to and did devise, give and bequeath to the said Hellen Landgren whose correct name is Helena Landgren, Katie McDonald whose correct name is Katherine McDonald and Mrs. Hertel, whose correct name is Margaret Hertel, all the property, real, personal and mixed that she owned, possessed and/or had any interest in at the time of her death. Such construction of said language being preferred in order to prevent a total intestacy as to the whole of the real property of said estate." The conclusions of law, the decree of distribution, and the amended decree of distribution were drawn accordingly and the entire estate was distributed in equal shares to the respondents.

The main controversy centers around the construction placed upon the last portion of the will. As to this portion of the will, the constructions placed upon it by the respective parties vary greatly, but as the will should be considered as a whole, we will first discuss the preceding provisions.

While the construction of the first portions of the will is not entirely free from difficulty, we believe that the intention of the testatrix is reasonably clear. She first left the stock in the Tamalpais Bank in San Rafael to Katie Krebb. The question then arises as to the disposition of the money in the Italian American Bank and the San Francisco Savings & Loan Society. The use of the small letter in the word "the" preceding the word "mony," the use of the period after the word "bank," and the use of what appears to be a parenthesis should not be taken as controlling for the reasons hereinabove stated. 69 Cor. Jur. 85, § 1143. Furthermore, the words, "the mony in" should be treated as relating to both banks. So treating said words, this portion of the will becomes entirely intelligible; otherwise, said portion is unintelligible. We therefore believe that said portion should be construed as giving the money in the Italian American Bank and the San Francisco Savings & Loan Society to Ludwig Gramlich, Valtin Gramlich, whose correct name is Franz Valentin Gramlich, Julia Hunsinger, and Anna Neufeld. The testatrix then left the sum of $250 each to Frank Theis, Erick Theis, Walter Rothschild, and Jenneth Landgren, and the sum of $500 to the children of Frank Gramlich.

Up to this point in the will the parties are practically agreed upon what the testatrix intended by the words used. Coming to the last portion of the will, it appears to be conceded that the bonds were intended for Mamie Eber Beach, Helena Landgren, and Katherine McDonald. Some of the parties relate the words "after all my bills are paid" to the bequest of the bonds, but it is again apparent in this portion of the will that we cannot treat as controlling the use of punctuation marks or the failure to capitalize the first word of each sentence. It is far more reasonable to assume that the words "after my bills are paid" relate to the remaining portion giving "all my personal property" to others. This construction is strengthened by the consideration that it appears that the testatrix had but one bond of the par value of $500, which was appraised at "nil," and it is not reasonable to assume that the testatrix intended that the persons named to receive said bond should receive only their proportionate shares of the remaining proceeds after the sale thereof and the payment of all bills.

The words which give rise to the main conflicting contentions of the parties are "to Hellen Landgren Katie McDonald and her Sister Mrs. Hertel all my personal property I have to do as the liek the Executor of this my last will and Testament with out bonds." Relating the words "after all my bills are paid" to this portion of the will, the phrase reads "after all my bills are paid. to Hellen Landgren Katie McDonald her Sister Mrs. Hertel all my personal property I have to do as the liek the Executor of this my last will and Testament with out bonds." Some of the appellants contend that this should be construed as a mere appointment of said parties as executrices; other appellants contend that it should be construed as an appointment of executrices and also as a bequest, but merely as a bequest of personal effects; and respondents contend, as determined by the court, that it should be construed as an appointment of the executrices and as giving the entire estate, real and personal, to respondents, and further contend that said language is "clear and distinct and absolutely irreconcilable with the former parts of said will" and should prevail over the former parts of the will. Probate Code, §§ 103 and 104.

We cannot agree entirely with either the contentions of appellants or those of respondents. The estate of the testatrix consisted mainly of money in bank, stocks, the bond above mentioned, and two pieces of real estate. The real estate was appraised at about one-half the value of the entire estate.

[1-3] In construing said will, we must bear in mind that "the very fact of making a will raises a presumption that the testatrix intended to dispose of all of her property." 26 Cal. Jur. p. 899. Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy. While this rule is codified as to total intestacy (Probate Code, § 102), the principle is also applicable to avoid partial intestacy. In re Estate of Farelly, 214 Cal. 199, 206, 4 P.(2d) 948; In re Estate of Heberle, 153 Cal. 275, 95 P. 41; O'Connor v. Murphy, 147 Cal. 148, 81 P. 406. In other words, constructions

which lead to either total or partial intestacy are not favored. In re Estate of Gracey, 200 Cal. 482, 253 P. 921; In re Estate of O'Gorman, 161 Cal. 654, 120 P. 33. We must further bear in mind that technical words are not always to be taken in their technical sense when used in a will. A nontechnical meaning may be given to such words where the will is drawn solely by the testatrix and it appears that she was not familiar with such technical terms. Probate Code, § 106; In re Estate of Gracey, supra.

While the words "personal property," when used technically, do not include real estate, these words and other words ordinarily used in a restricted sense have frequently been given a broader meaning when used by persons unfamiliar with technical terms. West v. West, 215 App. Div. 285, 213 N. Y. S. 480, 481; In re Swentzell's Estate, 294 Pa. 261, 144 A. 129; Harding's Estate, 1 Pa. Dist. & Co. R. 538; In re Estate of Miller, 48 Cal. 165, 17 Am. Rep. 422; In re McKendrie's Estate, 150 Misc. 665, 271 N. Y. S. 228; First National Bank of Saugerties v. Hurlbut, 22 Hun (N. Y.) 310; 50 C. J. p. 759, § 32. The tendency to avoid restricted meanings where such meanings result in partial intestacy is well illustrated in Re Estate of Miller, supra, where the word "money" was held to include other personal property and also real property. See, also, In re Estate of Carrillo, 187 Cal. 597, 203 P. 104. In West v. West, supra, the court held that the words "my personal property" included real property, the court treating the expression as meaning "my own property" or "the property I own personally." It is there pointed out that the fact that the will contained no residuary clause in the ordinary form indicated that "the testator thought that he had disposed of all of his property by the dispositive provisions of the will." Quoting from 2 Redfield on Wills (3d Ed.) 235, the court said: "The idea of any one deliberately purposing to die testate as to a portion of his estate and intestate as to another portion is so unusual in the history of testamentary dispositions as to justify almost any construction to escape from it." We believe this to be the correct rule with the qualification that "interpretation must be reasonable." Civ. Code, § 3542.

In Harding's Estate, supra, the words "personal properties" were held to mean "my properties." In 50 C. J. 759, in treating the words "personal estate," it is said, "But this expression may be used to indicate private, individual, or separate property, the estate which belongs to someone 'personally,' and not to mean personal property as distinguished from real estate."

In the case of In re Estate of Puett, 1 Cal.(2d) 131, 33 P.(2d) 825, cited by appellants in support of their claim for a narrower meaning for the words "personal property," the court declares that "the interpretation to be given a particular testamentary instrument must turn upon the language peculiar thereto" and that decisions in other cases are of but little assistance other than to announce the rules of construction. It is stated on page 133 of 1 Cal.(2d), 33 P.(2d) 825, 826, that, "it is generally recognized that a testamentary instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention, and that the *apparent meaning of particular words, phrases, and provisions is to be subordinated to this scheme, plan, or dominant purpose.*" (Italics ours.)

[4] In the light of the foregoing rules and authorities, we believe that words "all my personal property," as used by the testatrix in the will before us, should be interpreted as meaning "all my own property" or "all my property which I own personally" and as including real property as well as what is technically known as personal property. This was the construction placed upon this expression by the court below, but the court went further and concluded that this provision of the will was absolutely irreconcilable with the previous provisions of the will and therefore prevailed over such previous provisions. The result was to defeat and render void all the preceding provisions of the will.

[5] We are of the opinion that the last-mentioned conclusion cannot be sustained. This conclusion is based upon the last phrase of section 103 of the Probate Code, which section reads as follows: "Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must pre-

vail." After the court below had concluded that the last portion of the will purported to cover both real and personal property, it took the position that said last portion was absolutely irreconcilable with the former portions making specific bequests. We believe that this position ignores the portion of the section providing that "all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole." It will be noted that the bequests set forth in the first part of the will are specific, while the language of the last part of the will is general. The rule under these circumstances is to treat the specific gifts as exceptions to the general gift rather than as inconsistent or irreconcilable with such general gift. Page on Wills, § 865, p. 1462; Thompson, Construction of Wills, § 96, p. 177; Redfield (3d Ed.) Wills, p. 418, and cases cited. This rule gives effect to the specific bequests and is in accord with the provisions of section 3541 of our Civil Code, which provides: "An interpretation which gives effect is preferred to one which makes void." It further gives a residuary effect to the last portion of the will before us, and taking the will by the four corners we are satisfied that this was the intention of the testatrix. Harrison v. Jewell, 2 Dem. Sur. (N. Y.) 37.

We therefore conclude that a decree of distribution should have been entered giving effect to the specific bequests contained in the will and distributing the remaining estate to respondents. As we are of the opinion that there was no intestacy as to any portion of the estate, we need not consider the claim of certain appellants to the effect that the property was the community property of the testatrix and her husband who predeceased her by nineteen years. The claim of these appellants under section 228 of the Probate Code is entirely dependent upon the soundness of their contention that the testatrix died intestate as to some of her property.

[6, 7] In disposing of these appeals, we have yet to consider the relationship between the minute order, the decree of distribution, and the amended decree of distribution. As stated above, appeals were taken from all three. In our opinion the appeal from the minute order should be dismissed as said order was merely a preliminary order for a decree of distribution rather than a decree of distribution. "An order for judgment is not a judgment." United Taxpayers' Co. v. San Francisco, 55 Cal. App. 239, 243, 203 P. 120, 121. While a decree of distribution need only be "entered at length in the minute-book of the court" and need not be a separate instrument signed by the judge and filed (Probate Code, § 1221), the question still remains as to whether a particular entry in the minute book constitutes an order for a decree of distribution or the decree itself. It is a matter of common knowledge that a preliminary order for a decree of distribution is customarily entered in the minute book and that thereafter a separate instrument is customarily signed by the judge, filed, and copied at length into the minute book. It seems entirely apparent from a reading of the minute order of August 9, 1934, hereinabove set forth, that it was the customary order for the decree of distribution and nothing more.

After the entry of said minute order, a decree of distribution and an amended decree of distribution were entered. It seems to be conceded that the amended decree of distribution was entered for the purpose of correcting a clerical error in the decree of distribution and none of the parties have questioned the action of the trial court in entering an amended decree for that purpose. In ordering a reversal, we therefore deem it unnecessary to consider the relationship between the decree and the amended decree, but believe it proper to reverse both the decree and the amended decree.

The appeal from the minute order entered on August 9, 1934, is dismissed. The decree of distribution and the amended decree of distribution are reversed with directions to the trial court to enter a decree of distribution consistent with the views expressed herein.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

9 Cal.App.2d 451

PEOPLE v. PRATCHNER.

Cr. 187.

District Court of Appeal, Fourth District, California.

Oct. 11, 1935.

1. **Criminal law** 🔑511(1)

In prosecution for sex perversion, complaining witness' testimony *held* sufficiently corroborated (Pen. Code, § 288a).

2. **Criminal law** 🔑730(7)

In prosecution for sex perversion, deputy district attorney's reference in argument to fact which was reasonable and almost necessary inference from certain testimony given by complaining witness *held* not prejudicial, where jury was instructed to disregard statement (Pen. Code, § 288a).

3. **Criminal law** 🔑720½

In prosecution for sex perversion, deputy district attorney's statement in argument that he believed that accused was guilty of offense with which he was charged *held* not prejudicial, where there was nothing to show that such belief was not based upon evidence, and statement followed reference to summary of evidence which had just been given by deputy district attorney (Pen. Code, § 288a).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

W. W. Pratchner was convicted of violation of section 288a of the Penal Code, and he appeals.

Affirmed.

Stanford G. Smith, of Santa Cruz, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was charged with a violation of section 288a of the Penal Code. He was found guilty by a jury and has appealed from the judgment and from an order denying a motion for a new trial.

[1] It would serve no useful purpose to set forth the evidence here. The testimony of the complaining witness, aside from the question of corroboration, is amply sufficient to sustain the verdict. The main contention here is that the testimony of this witness was not sufficiently corroborated. A reading of the record clearly shows this contention to be without merit. There is evidence of other instances of improper conduct on the part of the appellant with other boys. It appears that the appellant frequently had the complaining witness in his room and was much in his company; that the father of the boy complained to the appellant about his keeping the boy from coming home from school on time; that the father told the appellant not to come to his home again; and that the appellant, while denying that the particular incident happened, did not deny that the boy was in his room at the time in question. There is also the testimony of another boy who found the appellant and the complaining witness in a most compromising position just a few minutes before the offense is alleged to have been committed. The evidence referred to tended to connect the appellant with the commission of the crime and furnished sufficient corroboration within the well-known rules. People v. Nichols, 2 Cal. App. (2d) 99, 37 P.(2d) 710.

[2] The only other point raised is that the deputy district attorney was guilty of prejudicial misconduct in his argument to the jury. Two instances are cited. In the first of these, while the deputy district attorney was summarizing the testimony of the main corroborating witness, he referred to one fact which was a reasonable and almost necessary inference from certain testimony given by the complaining witness. This was assigned as misconduct and the jury was instructed to disregard the statement. In referring to the matter, the deputy district attorney plainly stated that this fact was testified to by the complaining witness. The fact in question was fairly in evidence, was attributed to the right witness, and we are unable to see that the statement as made was improper. In any event, the instruction to disregard the statement was a sufficient protection of the appellant's rights.

[3] Another statement made by the deputy district attorney in his argument was assigned as misconduct but no request was made to have the jury instructed to disregard it. While the matter is set out in the appellant's brief, no argument is made, and we are not advised as to what part of the statement is objected to or as to what the objections are. Apparently the criticism is that the deputy district attorney expressed a belief that the appellant was guilty

of the offense with which he was charged. While such a belief was expressed, there is nothing to show that it was not based upon the evidence, and, on the other hand, it follows a reference to the summary of the evidence which had just been given by the deputy district attorney. Such a situation does not indicate misconduct requiring a reversal. People v. Bracklis, 54 Cal. App. 40, 200 P. 1062.

The judgment and order are affirmed.

We concur: MARKS, J.; JENNINGS, J.

* * *

CONSOLIDATED STEEL CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 10319.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1935.

Hearing Granted by Supreme Court Dec. 16, 1935.

Master and servant ⇨419

Under evidence disclosing that on September 4, 1930, employee received injury to finger, that there had been no appreciable change in employee's finger between August, 1931, and October, 1934, and that last payment of compensation was made in February, 1931, application for additional compensation filed in August, 1934, *held* barred (St. 1917, p. 841, § 11 (b) (1).

◆

Proceedings by the Consolidated Steel Corporation, Limited, employer to review an award of the Industrial Accident Commission of the state of California granting compensation to Ray Roldan, employee.

Award annulled.

Loeb, Walker & Loeb, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

SHINN, Justice pro tem.

On September 4, 1930, Ray Roldan (referred to herein as respondent), while employed by petitioner, received among other injuries a dislocation of the joint of the left little finger. He received medical and surgical treatment and compensation, the last payment of compensation having been made February 12, 1931. He applied for further medical and surgical treatment for the injury to his finger, and on August 19, 1931, was examined at petitioner's expense by a surgeon, who reported further surgery on the finger was advisable. Respondent entered a hospital on or about September 17, 1931, but, apparently because of lack of confidence in the proposed method or probable result of an operation, refused to take an anaesthetic or allow the surgeon to proceed with the operation. Nothing further was done in the matter until August 29, 1934, when respondent filed an application with the Industrial Accident Commission seeking further medical attention and treatment. After answer duly filed by petitioner, a hearing was had, and upon findings duly made that respondent was entitled to further medical treatment, together with compensation payments during any period of disability caused by or resulting from said treatment, an award was made in favor of respondent for further medical treatment consisting of an operation upon the injured finger. Upon a rehearing by the commission, the findings and award, theretofore made, were adopted as the decision on rehearing. Petitioner seeks to have the award annulled upon the ground that the proceeding was not instituted within the limited period allowed by the Workmen's Compensation, Insurance and Safety Act of 1917, § 11, subd. (b) (1), St. 1917, p. 841.

The physician's examination on August 19, 1931, disclosed that respondent had suffered a fracture and dislocation of a joint of the left little finger of such a nature that the alignment of the finger was disturbed, so that upon closing the hand the little finger came underneath the ring finger. There was a tender prominence in the left palm. X-ray pictures taken at the time disclosed these conditions. On October 22, 1934, respondent was again examined by another physician, who had before him the previous reports and pictures made in August, 1931. The finding upon the later examination was that there appeared to be no appreciable change in the finger after the former examination, there being the same indications for opera-

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⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 57 P.2d 919.

tion at the later examination as were disclosed by the former.

Under section 11, subd. (b) (1) of the act, proceedings for the collection of compensation for disability and for medical and hospital treatment, under the facts presented here, must have been commenced within six months after the date of the injury, or within six months after the date of an agreement to pay compensation, or the date of the last payment of compensation, or the expiration of the period covered by such payment; provided that the proceeding might have been commenced within 245 weeks after the date of the injury, if the original injury has caused new and further disability. The bar of the statute was pleaded as a defense to the application. The findings of the commission are not specific as to this defense. It was found only that the employee is entitled to further medical treatment and to compensation during the disability caused thereby.

In support of the award, it is urged that the commission has found, impliedly, the existence of facts necessary to show the claim to be not barred. For the purposes of this decision, we may so assume. The facts, however, are not in dispute, and, in our view, a finding upon any ground that the claim is not barred would be without support in the evidence. It is admitted that the last payment of compensation was made February 12, 1931, and that no agreement for compensation was made. It is claimed, however, that the evidence is sufficient to show that respondent has suffered new and further disability. Respondent points out that in December, 1930, he submitted to surgery upon the hand, which it was hoped would, to some extent, cure the malformation, but which did not achieve the desired result. The failure of this operation, it is said, resulted in a new and further disability, upon the theory, as we understand it, that the injury thereupon passed from a temporary disability to a permanent one. Also, the statement is made that it was only after approximately three years that the injury became such that respondent was unable to continue with his work. We find no evidence, either in the medical testimony or in that of respondent, to warrant either of these conclusions.

The evidence shows, without conflict, that the condition of respondent's hand did not undergo any change from the beginning. It healed in a deformed shape and with a definite loss of function. It has not grown progressively worse. It has not become painful, except when in use, and that is not a new condition, nor has it become any less useful. The report of the medical examination made October 22, 1934, states: "There has been no appreciable change in the condition since then (referring to the date of examinations in August and September, 1931) and evidently the same indications for operation are present now as were present at that time." The condition is manifestly a permanent one, the record being barren of any suggestion of more than a possible improvement in the condition which may be accomplished by surgery. But whether the condition be permanent, or curable, and therefore temporary, it is a condition that has existed from the beginning and not a new one.

Respondent has cited to us Cowell L. & C. Co. v. Industrial Accident Commission, 211 Cal. 154, 294 P. 703, 72 A. L. R. 1118, and Armstrong v. Industrial Accident Commission, 219 Cal. 673, 28 P.(2d) 672, to which may be added City of Pasadena v. Industrial Accident Commission, 136 Cal. App. 649, 29 P.(2d) 447; and petitioner cites Associated Oil Co. v. Industrial Accident Commission, 214 Cal. 358, 5 P.(2d) 420. All of these cases hold, in effect, that the time within which a proceeding shall be commenced is 245 weeks, in cases where the original injury causes new and further disability, and 6 months, where the facts proved do not bring the case within the exceptions to the 6 months' provision. The record in the instant case, as in Associated Oil Company v. Industrial Accident Commission, supra, shows an original injury and no new or further disability, in which respect it differs from the cases cited by respondent, in which the evidence was held sufficient to support the findings of the commission that new and further disability had occurred. The claim upon which the award was made was barred at the time the proceeding was instituted.

The award is annulled.

We concur: HOUSER, P. J.; YORK, J.

In re PITCAIRN'S ESTATE. *

BOYDEN et al. v. REIMANN et al.
Civ. 10378.

District Court of Appeal, Second District, Division 1, California.
Oct. 10, 1935.

Rehearing Denied Nov. 4, 1935.
Hearing Granted by Supreme Court Dec. 9, 1935.

1. Wills 🔑304

Inference of due execution of will arising from proof of signatures of testatrix and subscribing witnesses is sufficient to make out prima facie case entitling will to probate only where witnesses are dead, out of county, or have no recollection of subject of execution (Probate Code, §§ 50, 329).

2. Wills 🔑304

Inference of due execution of will arising from proof of signatures of testatrix and subscribing witnesses *held* insufficient to establish prima facie case entitling will to admission to probate in face of positive corroborated testimony to contrary and in absence of attestation clause where subscribing witnesses were alive and in county (Probate Code, §§ 50, 329).

3. Wills 🔑108

No right exists to make testamentary disposition except upon compliance with legislative mandates as to mode of execution or authentication of will (Probate Code, § 50).

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Proceedings in the matter of the estate of Mary Miller Pitcairn, deceased, by Edgar R. Boyden and others, petitioners, against Caroline Pitcairn Reimann and another, contestants. From a judgment admitting to probate an instrument purporting to be the last will and testament of Mary Miller Pitcairn, the contestants appeal.

Reversed.

Leonard L. Riccardi, of Pasadena (William J. Donahue, of Hollywood, of counsel), for appellants.

Crail, Shutt, Crail & Crail, of Los Angeles, for respondents.

ROTH, Justice pro tem.

This case is before us on an appeal from a judgment decreeing that a document entirely written and signed in the handwriting of testatrix, except for the date, and subscribed by two witnesses immediately under the signature of the testatrix, there being no attestation clause, was the last will and testament of testatrix, and that the same be admitted to probate.

[1, 2] The signatures of testatrix and the subscribing witnesses were proved genuine without controversy. Such proof made out a prima facie case, and, in the absence of evidence showing that the requirements of section 50 of the Probate Code had not been complied with, is a sufficient showing for admission of the will to probate. In re Estate of Tyler, 121 Cal. 405, 53 P. 928; In re Estate of Kent, 161 Cal. 142, 118 P. 523; German Evangelical Bethel Church v. Reith, 327 Mo. 1098, 39 S.W.(2d) 1057, 76 A. L. R. 604; In re Cottrell's Will, 95 N. Y. 329.

In Re Estate of Tyler, supra, 121 Cal. 405, page 409, 53 P. 928, 929, the court said: "There is no statutory declaration, and no principle of law, to the effect that a will executed in due form shall go for naught unless an attesting witness, after the lapse of many years, shall continue to recollect everything material that occurred at the time he subscribed his name to it. Such a rule would make the validity of the will dependent, not upon the disposing mind of the testator, nor his freedom from duress, undue influence, or fraud, nor upon his clear expression of his intention in the body of the instrument, nor upon its execution in conformity to the form and ceremony prescribed by the statute, but upon the fullness, accuracy, and persistency of the recollection of one of the persons who signed it as a witness. Such a rule cannot be maintained either upon principle or precedent."

In the instant case, evidence was given by the subscribing witnesses placing in issue every requisite of execution. It was disputed that the document was a will, or that it was signed by testatrix, or subscribed by the witnesses as a will, or that it was published as a will; or that it was signed by testatrix in the presence of the two witnesses, or that the witnesses signed in the presence of each other and in the presence of the testatrix. The court found against the contestants to the probate on all of these issues. The subscribing witness Alcock testified, her testimony being corroborated by the evidence of the other

*For subsequent opinion see 59 P.2d 90.

subscribing witness, that she was not in the room when the testatrix signed, or when the other witness signed; that she was asked to sign a "piece of paper"; that she was not told by the testatrix or any one else that what she signed was a will, and that she did not know it was. If this testimony had been accepted as true by the trial court, instead of being rejected, as it was, or if it *must* be accepted as the fact, then, of course, the judgment is erroneous and must be reversed. In addition to the testimony outlined given by the witness Alcock, which the court rejected, she testified that the date on the will was in the handwriting of the testatrix. A handwriting expert testified, which testimony was accepted by the court, that the will had not been dated by the testatrix, but by the witness Alcock herself.

The foregoing résumé of the evidence as to the manner in which and the circumstances under which the witness Alcock signed is not rebutted or contradicted. Respondents contend that proof of the signature of the testatrix and of the two subscribing witnesses creates a *presumption* of due execution, even though there is no attestation clause, when there is a contradiction in the testimony of a subscribing witness, as there is in this case in the testimony of the witness Alcock, and that such presumption, in spite of positive evidence of the subscribing witnesses contrary thereto, creates a conflict in the evidence from which a trial court may properly find for or against due execution. In short, the contention of respondents is that a trial court may ignore the direct testimony of the subscribing witnesses. If there were an attestation clause, and a subscribing witness gave testimony contrary to the due execution of the will, or if, in the absence of an attestation clause, the subscribing witnesses were dead or out of the county, or, if called, *failed to recollect anything* concerning the execution of the will, then respondents' proposition might be conceded. In re Estate of Tyler, 121 Cal. 405, 53 P. 928; In re Estate of Kent, 161 Cal. 142, 118 P. 523; In re Cottrell's Will, 95 N. Y. 329; German Evangelical Bethel Church v. Reith, 327 Mo. 1098, 39 S.W. (2d) 1057, 76 A. L. R. 604, 617. Since in this case there is no attestation clause, we are not confronted with that question. Upon the facts of this case, the witnesses being alive and in the county and *there being no attestation clause,* we are convinced that the weight of authority is against the so-called presumption of due execution, in the face of positive corroborated testimony to the contrary. In re Estate of Lawrence, 196 Cal. 321, 237 P. 738; In re Estate of Emart, 175 Cal. 238, 165 P. 707; In re Estate of Dow, 181 Cal. 106, 183 P. 794; In re Estate of Tyler, 121 Cal. 405, 53 P. 928; In re Estate of Kent, 161 Cal. 142, 118 P. 523; 76 A. L. R. 623; Rolleston v. Sinclair, 2 Ir. R. 157; Estate of Strong, [1915] Prob. (Eng.) 211; Reynolds v. Massey, 219 Ala. 265, 122 So. 29. The court in Re Estate of Tyler, supra, makes it clear that proof of signatures, in the absence of an attestation clause, is sufficient to make out a prima facie case, when there is no evidence to the contrary. An analysis of the cases demonstrates that practically all of them, in which a will without an attestation clause has been admitted to probate merely upon proof of signatures, hold nothing more than what is held in the Tyler Case. In most of the cases which we have analyzed, the witnesses have been dead, out of the county, or have had no recollection as to the details of execution. It should also be borne in mind that a proper attestation clause generally recites the details of execution above the signatures of the subscribing witnesses, and that this is true in a substantial measure even of a defective attestation clause. A prima facie case is then made out, not because of any presumption, but rather because of the written assertions of the subscribing witnesses which are a part of the will. It thus appears that what is called a presumption of due execution because of proof of signature to a will, where there is an attestation clause or a defective attestation clause, is in reality a finding by the court from evidence contained in the instrument. Thus, when the subscribing witnesses in such cases give positive contrary testimony, and the court holds in favor of due execution, the holding is in reality a finding from conflicting evidence, to wit, those declarations made by a witness at the time he signs the will, and the statements made by a witness when he testifies in court. In a true sense *an inference and not a presumption* arises from proof of signatures alone only in those cases where there is no attestation clause. Probate Code, § 329, last sentence. This inference is sufficient to make out a prima facie case, but in this state is limited to those cases where the witnesses are dead, out of the county, or have no recollection of the subject of execution. In re Estate of Tyler, 121 Cal. 405, 53 P. 928; In re Estate of Kent, 161 Cal. 142, 145, 118 P. 523. Thus in Re Estate of Tyler, supra, 121 Cal. 405, at page 406, 53 P. 928, the court says:

"The sole contention of appellants is that the execution of the will was not sufficiently proved. And as to this point *appellants did not themselves introduce any evidence to show that the will was not duly executed.* They rely entirely upon the asserted insufficiency of the evidence of respondent. Indeed, *the appellants offered no evidence at all on any material issue in the contest.* They rest solely upon the proposition that the respondent did not prove enough." (Italics ours.)

[3] As said by the court in Re Walker's Estate, 110 Cal. 387, 390, 42 P. 815, 816, 30 L. R. A. 460, 52 Am. St. Rep. 104:

"It is not for courts to say that these requirements, or any of them, are mere formalities, which may be waived without impairing the status of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose, and is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates.

"It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject-matter of the execution and authentication of wills is technical, and nothing else; and it must not be forgotten that the technicalities are those which the lawmaking power has the right to impose, and has imposed, upon the maker of a will." To the same effect are In re Seaman's Estate, 146 Cal. 455, 80 P. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726; In re Noyes' Estate, 40 Mont. 178, 105 P. 1013; In re Delprat's Will, 27 Misc. 355, 58 N. Y. S. 768; Woolley v. Woolley, 95 N. Y. 231.

The judgment admitting the will to probate is reversed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 495

ANDRADE v. AZEVEDO.

Civ. 9778.

District Court of Appeal, First District, Division 1, California.

Oct. 16, 1935.

1. Executors and administrators 🔑217

Ordinarily, volunteer or stranger cannot claim subrogation against estate for a debt that he has paid, for, to give rise to such right, payment must be made by one who is personally interested therein.

2. Executors and administrators 🔑217

Deceased's son and daughter *held* entitled to recover from administrator amount which they paid for funeral and medical expenses of deceased where all of heirs, including administrator, knew of arrangements for payment of such expenses, and that son and daughter had promised to pay them for benefit of estate, and raised no objection to such plan.

3. Executors and administrators 🔑217

Heirs who had interest in estate and had paid claims against estate for medical and funeral expenses *held* not precluded from subrogation therefor against administrator as "volunteers."

[Ed. Note.—For other definitions of "Volunteer," see Words & Phrases.]

4. Executors and administrators 🔑221(6)

In action against administrator for subrogation for claims against estate paid by heirs, evidence *held* not insufficient to sustain finding that amount of claims was reasonable, where plaintiff alleged that items were reasonable and administrator raised no question on subject at trial and offered no evidence that claims were unreasonable, and all heirs knew amount of claims and that they were to be paid by plaintiff, and her assignor made no objection to reasonableness of charges.

5. Executors and administrators 🔑221(3)

In action against administrator for subrogation of claims against estate paid by heirs, evidence of special defense that plaintiff was indebted to deceased *held* properly excluded where claim was barred by limitations.

◆

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Inez Andrade against J. F. Azevedo, as administrator of the estate of Manuel Francisco Azevedo, deceased. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

E. H. Christian, of Oakland (Ernest S. Leslie, of Oakland, of counsel), for appellant.

Manuel F. Sylva, of San Francisco, for respondent.

TYLER, Presiding Justice.

Plaintiff and respondent bases her cause of action on the doctrine of subrogation. The facts show that Manuel Francisco Azevedo died intestate, leaving four children all between the ages of forty and fifty years. They are Inez Andrade, plaintiff and respondent herein; Isabella Perry, Manuel Francisco Azevedo, Jr., and J. F. Azevedo, appellant and defendant herein. Shortly before his death the father told his daughter Inez Andrade that he wanted her to take charge of his affairs after his death. On the evening following their father's death all of the children met at the father's home to discuss funeral arrangements, at which time Inez Andrade told the others of her father's request that she take charge of his affairs. On the following day Inez and J. F. Azevedo, defendant herein, visited an undertaker to make arrangements for the funeral. The arrangements were similar to those made for their mother's funeral, who had been buried a short time previous by this same undertaker. The deceased had expressed the desire to have the same character of funeral that had been furnished for his wife. Defendant knew the cost of the same. After the funeral Inez Andrade, believing that she would be appointed administratrix of her father's estate, paid the bill of a nurse who had attended his last illness. This bill amounted to the sum of $10. She asked her brother Manuel Francisco Azevedo, Jr., to advance money for other expenses, which he did. Thereafter the brother J. F. Azevedo, defendant and appellant herein, contested her petition for letters of administration, and he was appointed administrator of the estate. Within the time limited for the presentation of claims to the estate Inez Andrade filed a claim containing an item of $7, the amount of the filing fee for letters, and another item of $10, which she had paid for the nurse's services. Manuel Francisco Azevedo, Jr., filed claims as follows: $814, paid the undertaker; $144, paid the doctor who had administered to the father in his last illness; $46.70 to a sanitorium where the father died, and $52 for flowers. These claims were all rejected. Thereupon Manuel Francisco Azevedo, Jr., assigned his claim to his sister, who filed this action.

The third amended complaint shows six counts covering the items referred to. A demurrer was sustained to the first count relating to the filing fee, and the case went to trial on the remaining counts.

Defendant, in addition to his answer to the amended complaint, set up a special defense against plaintiff for the sum of $7,000, alleging that she was indebted to the decedent for moneys advanced in that amount. This defense was demurred to, but the demurrer was overruled. Plaintiff then filed a plea of the statute of limitations to the pleading. At the trial judgment was given for the plaintiff on these five counts.

It is appellant's main contention that the payment of the claims by respondent and her assignor was that of a volunteer, for which reason no recovery can be had.

[1-3] It is true that ordinarily a volunteer or stranger cannot claim subrogation against an estate for a debt that he has paid, for, to give rise to such a right the payment must be made by one who is personally interested in the same. Here, however, with reference to the funeral expenses and other items involved, all of the heirs, including defendant, knew of the arrangements for the payment of the same, and that plaintiff and her assignor had promised to pay them for the benefit of the estate, and they raised no objection to this plan. Moreover, an heir who has an interest in an estate and pays claims of this character against the estate does not act officiously, and is not a "volunteer" within the rule that a volunteer is not entitled to subrogation. This being so, the estate should repay him. This is a proper and, indeed, a necessary rule in view of the fact that burial must often be provided for before an executor or administrator can be appointed. Matter of Estate of Hincheon, 159 Cal. 755, 116 P. 47, 36 L. R. A. (N. S.) 303.

Objection is made that there is no evidence to sustain the findings that the amounts of the various claims were reasonable.

[4] Plaintiff alleged that the items were reasonable, and defendant raised no question upon this subject at the trial, nor did he offer any evidence to show that they were unreasonable, the objection being merely that the payments were voluntary.

All of the heirs knew the amounts of the various claims, and that they were to be paid by plaintiff and her assignor, and no objection was made by any of them to the reasonableness of the charges. There is no merit in the objection.

The further claim is made that the court erred in refusing to admit evidence of the special defense that plaintiff was indebted to the deceased in the sum of $7,000.

[5] Plaintiff pleaded the statute of limitations to the defense. It is admitted by defendant that the claim is outlawed. Assuming that the special defense relied on is a proper one under our system of pleading, the fact that the claim is outlawed prevents its operation. Whether viewed as a counterclaim or a mere defense, the relief sought being barred by limitation, the plea of the statute as a bar to the attempted defense is just as effective as it might have been in a case where the relief was sought in an independent action. 23 Cal. Jur., p. 234, § 12; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254; Sanders v. Sanders, 117 Cal. App. 231, 3 P.(2d) 599.

The judgment awarded plaintiff the sum of $1,014.70 together with $110 as interest. Appellant claims the amount of interest to be excessive in the sum of $22.74. Respondent concedes this to be true. This sum, therefore, must be deducted from the judgment. With this modification the judgment appealed from is affirmed, respondent to recover her costs.

We concur: KNIGHT, J.; CASHIN, J.

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9 Cal.App.2d 478

PEOPLE v. BEESON et al.

Cr. 2737.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1935.

1. Criminal law 🔑532(2), 1153(6)

Admission of confession rests in broad discretion of trial judge and will not be disturbed on appeal where no abuse of discretion is shown.

2. Criminal law 🔑532(2)

Admission of confession which defendants contended was procured by duress of police officers, after voir dire examination from which it appeared confession was voluntarily made, *held* not abuse of discretion.

3. Criminal law 🔑538(3)

Defendant's confession of robberies and his identification by people who were employed in establishments which were robbed *held* to sustain robbery convictions.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Emmett Beeson, Clifford Hipp, and Walter Young were convicted of robbery, and Clifford Hipp appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SHINN, Justice pro tem.

This is an appeal by defendant Clifford Hipp, also known as Donald Wright, from judgments of conviction after jury trial, of robbing Wayne Nickell of the sum of $48 on or about December 29, 1934, and of robbing Everett Teal of the sum of $28.01 on or about January 2, 1935. He was charged jointly with Emmett Beeson and Walter Young with the commission of said offenses, and with a third offense of robbing Don Healey of the sum of $15, upon which third charge he was acquitted. He appeals from the judgments, and presents two grounds for reversal thereof, namely, insufficiency of the evidence, and error in the admission of a confession, which he contends was procured by duress on the part of police officers.

Wayne Nickell was robbed at about 3:30 a. m., while working in a restaurant, by two boys, one of whom carried a gun and who was identified as the defendant Young. The prosecuting witness, Nickell, testified that the other boy, claimed by the people to be defendant Hipp, had a hat pulled down over his face during the robbery, which prevented a clear view of his features. His identification of this defendant, if it stood alone, would raise a serious question as to its sufficiency to connect the defendant with this robbery. However, it was supported by the admission of the defendant Hipp, to be discussed later.

The witness Everett Teal, testifying to the facts charged in the second count of the information, related a robbery by two boys about 5:00 a. m. on January 5, 1935, in a restaurant where Teal was employed. He identified Walter Young as one of the robbers and appellant Hipp as the other. He testified that Hipp took the money from the cash register while Young pointed a gun at him, and that he also handed Hipp some more money, making $28.01 in all, of which he was robbed. He identified both defendants from photographs shown him by the police, and again when he saw them in jail, although they were differently dressed; and he testified that he had had a good look at them during the robbery.

[1, 2] Appellant was arrested on the morning of January 10, 1935, while in bed in a rooming house in Los Angeles. In the afternoon of that day he signed a statement confessing the crimes with which he was charged. When objection was made to the statement, a voir dire examination was conducted by defendant's counsel, from which it appeared that the statement was made voluntarily, and after a full hearing the statement was admitted. The ruling was one within the broad discretion of the trial judge. It may not be disturbed on appeal where no abuse of discretion is shown, and none is shown here. People v. Madsen, 93 Cal. App. 711, 270 P. 237; People v. Dye, 119 Cal. App. 262, 6 P.(2d) 313. Defendant testified that he made the statement only after being deprived of food while in the jail, and after being beaten by the officers, this testimony being contradicted by that of the jailer and others. The issue was presented to and decided by the jury under proper instructions. In a signed confession defendants Young and Beeson admitted the robberies, including those with which they were charged and in which they implicated Hipp, as well as one in which they did not implicate him. Hipp was given an opportunity to read the statement, and was asked to mark with a cross and with his initials the robberies in which he did not participate. He crossed off one in which he had not been implicated, and signed his name to the statement. Of the crimes thus admitted, he was convicted of two and acquitted of the third.

[3] The confession, taken with the identifications of appellant by the witnesses, who were robbed, is sufficient to support the verdicts of guilty. The court did not commit error in admitting the confession, and the case, in other respects as well, was fully and fairly tried.

The judgments are affirmed.

We concur: HOUSER, P. J.; YORK, J.

BANKERS LIFE CO. v. CANTERBURY et al.*

Civ. 10367.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1935.

Hearing Granted by Supreme Court Dec. 16, 1935.

Mortgages ⚷559(4)

Statute precluding deficiency judgment on trust deed obligation, unless notice of breach and election to sell was recorded one year before sale, *held* not to affect rights of holder of trust deed executed prior to effective date of statute, since to give statute retroactive effect would impair obligation of contract rendering statute unconstitutional (Civ. Code, § 2924½, as added by St. 1933, p. 1674; Const. U. S. art. 1, § 10, cl. 1; Const. Cal. art. 1, § 16).

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Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by the Bankers Life Company against J. R. Canterbury, Jr., and another. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Norman T. Mason, of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendant after the trial court sustained a demurrer to plain-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 54 P.2d 717.

tiff's amended complaint without leave to amend.

The amended complaint alleged that a note and trust deed were executed by the defendant October 20, 1929, the note maturing between August 22, 1933, and September 1, 1935; the sale of the property secured by the trust deed on September 18, 1934; and that notice of breach and election to sell the property secured by the trust deed was recorded only three months before the date of sale. The complaint prayed for a deficiency judgment.

The sole question presented for determination on this appeal is:

Does the requirement that no deficiency judgment shall be rendered upon any obligation secured by a deed of trust with power of sale, following the exercise of such power of sale, unless it shall affirmatively appear that the notice of breach and election to sell, pursuant to which such sale was held, was recorded at least one year before the date of such sale, apply to a trust deed and promissory note executed prior to the effective date (August 22, 1933) of section 2924½ of the Civil Code?

We are of the opinion that section 2924½ of the Civil Code does not apply to notes or trust deeds executed prior to the effective date of the act. To hold otherwise would impair the obligation of a contract and render this section unconstitutional (Const. U. S. art. 1, § 10, ch. 1; Const. Cal. art. 1, § 16).

This same question was before Division 1 of this court on June 3, 1935, in the case of Brown v. Ferdon, 46 P.(2d) 218. Mr. Justice Edmonds in a well-reasoned opinion arrived at the same conclusion relative to the retroactive effect of section 2924½ of the Civil Code.

We agree with Mr. Justice McReynolds' statement: "In my view multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths of those published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt." Therefore we base our decision in the instant case upon the reasons set forth in Brown v. Ferdon, supra.

We are not unmindful that the Supreme Court has granted a hearing in Brown v. Ferdon, supra; however, we are of the opinion that no single act tends to destroy public confidence in courts of justice more readily than delay in the disposition of cases pending before them. Such procrastination causes the average citizen to believe that the judges are either indolent or unlearned in the law; hence unable to reach a decision. It has been the recent policy of this court to dispose of appeals presented to it promptly. Koeberle v. Hotchkiss, (Cal. App.) 48 P.(2d) 104. Accordingly, being satisfied with the reasoning in Brown v. Ferdon, supra, we are deciding the case before this court prior to the Supreme Court's final ruling on the question involved.

For the foregoing reasons, the judgment is reversed, with directions to the trial court to overrule the demurrer and grant defendant 10 days within which to serve and file an answer to plaintiff's amended complaint.

It is so ordered.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 353

McCLURE v. GRAHAM et al.

Civ. 9562.

District Court of Appeal, First District, Division 1, California.

Oct. 7, 1935.

Hearing Denied by Supreme Court Dec. 5, 1935.

1. Appeal and error ⇨1010(1)

Appellate court will not disturb finding if there is any substantial evidence to sustain it.

2. Fraud ⇨58(1)

In action for fraud in inducing plaintiff to part with money in realty transaction, evidence *held* to sustain finding that person in whom plaintiff had confidence and another defrauded plaintiff.

3. Fraud ⇨59(1)

In action for fraud in inducing plaintiff to part with money in realty transaction, rental received by plaintiff *held* not required to be credited on judgment, where, at time money was paid, plaintiff was equitable owner of apartment house.

4. Fraud ⇨58(1)

In action for fraud in inducing plaintiff to part with money in realty transaction, evidence *held* to show that title insurance company and its employees acted merely as accommodation for codefendants and were not guilty of fraud.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Mary T. McClure against John C. Graham and others. From an adverse judgment, named defendant and others, except Helen Doyle and another, appeal.

Affirmed in part, and reversed in part, with directions.

John B. Ehlen, I. Karmel, and Theodore M. Monell, all of San Francisco, for appellants.

C. K. Bonestell, of San Francisco, amicus curiæ.

Keyes & Erskine, of San Francisco, and Ira Abraham, of Oakland, for respondent.

PER CURIAM.

[1] Plaintiff's cause of action is based upon a real estate transaction. She alleges that the several defendants defrauded her in the sum of $12,500. Issue was joined, and, after a trial upon the merits, the court made and entered its findings of fact and conclusions of law in favor of the plaintiff. Upon the entry of judgment, the defendants, except Helen Doyle and Union Indemnity Company of Louisiana, a corporation, appealed. As to the last-named defendant the action was dismissed before trial. One of the claims of error presented by the several appellants is that as to him or it the evidence is insufficient to sustain the findings of fraud upon which the judgment is predicated. It is too well settled to require the citation of authority that, if there is any substantial evidence to sustain a finding, this court may not disturb the same. A statement of the evidence is, so far as necessary, as follows:

[2] Mary T. McClure, the plaintiff, testified that she resided in Oakland, Cal.; that she had been a widow for about six years; that prior to her husband's death her occupation was that of housewife; that she was unfamiliar with real estate transactions; that she had known the defendant Helen Doyle for about two years prior to the inception of the real estate transaction hereinabove referred to, and that she had known the defendant Graham for a short time; that her acquaintance with Miss Doyle had been intimate and she had confidence and trust in her and relied upon her in the transaction; that the first conversation upon the subject took place in San Francisco when defendant Doyle told her there was a transaction in defendant Graham's office concerning three pieces of property in San Francisco. One of the pieces of property was situated at the corner of Bush and Leavenworth streets, another at the corner of California and Buchanan streets, and another on Fillmore near Buchanan. The witness further testified that at a later date Miss Doyle called upon her at her home in Oakland, and, while the two were riding in an automobile, defendant Doyle told her that the property was still open, although a little more reduced in price than it had been the first time and she thought it would be a very wonderful thing if the plaintiff took it. "I said to her, 'Helen, is it something you would take if you had the money? I know nothing about real estate, and I am a stranger here in San Francisco. I will have to depend wholly upon you.' She said the equities were worth around $55,000 and the income would be in the neighborhood of five hundred dollars a month, or a little more perhaps." Defendant Doyle was going to get her the property for $10,000, and then something came up which raised the price to $11,000. Also she was required to advance another $500, and then at a still later date she again advanced another $1,000 which defendant Doyle claimed was necessary to save what had already been paid. The above payments were made as follows: On July 8, 1931, plaintiff gave her check to defendant Helen Doyle for $1,000, which was endorsed by the latter to the defendant Northern Counties Title Insurance Company and delivered to defendant Graham. On August 3, 1931, plaintiff gave another check for $10,000, payable to City Title & Insurance Company, and on the same day she gave another check payable to the City Title & Insurance Company for $500. The last two checks were sent by plaintiff to defendant Graham's office, and the $1,000 check which was given "to save the property," as aforesaid, was given to defendant Doyle. After the plaintiff had given the first three checks, which amounted to the sum of $11,500, defendants Doyle and Graham failed to purchase the three apartment houses which plaintiff McClure had agreed to buy, and, without her knowledge or consent, the money thus paid was used

to purchase one apartment house referred to as the "Bush Street Apartment," of which Graham became manager. The title thereto was taken as follows: At the request of defendant Graham, a deed of trust was executed in which one Warfield appeared as trustor, the Northern Counties Title Insurance Company as trustee, and defendants Keddie and Egan as beneficiaries under the designation "trustees." A holding agreement was prepared by Keddie and executed at the same time, which recited that Keddie and Egan were acting as trustees for defendants Doyle and Graham. A chattel mortgage on the furniture in the apartment house was also executed by Warfield to Keddie and Egan as additional security and was included in the above-mentioned holding agreement, and the amount specified in the trust deed and chattel mortgage as the consideration therefor was the sum of $17,000. It does not appear clearly why the above consideration was named, but, when later questioned by Mrs. McClure when the matter was called to her attention, it was stated by defendants Doyle and Graham that it was so she would have a greater interest in the property. At another time Graham said the additional sum was a profit for Mrs. McClure. All of the instruments were executed and deposited with the City Title & Insurance Company on or about the 1st of August, 1931, and the money deposited by plaintiff for the payment of the three apartment houses was, under the instructions of Graham, used for the purchase of this apartment house. After the transaction was closed and respondent discovered the trust deed was taken in the name of Warfield, she asked defendant Doyle the reason; the latter said that was customary in such deals and she thought it best that respondent's name should not appear. The latter said she would rather her name be kept out. It also appears from plaintiff's evidence that her attention was not called to this substitution of the one apartment house until January, 1932; and, further, it appears that the note, trust deed, and chattel mortgage which were taken to secure plaintiff's money were taken without the knowledge of plaintiff, subject to another trust deed and chattel mortgage held by other parties to secure the sum of $103,000, and that the property was subsequently sold by virtue of the last-named trust deed, and the security for plaintiff's money was lost and the obligation itself became worthless. It is clear from the record that the actual handling of the transaction was carried on through defendants Graham and Doyle. True, defendant Graham testified that the plaintiff was informed of the purchase of the one apartment house and that she assented thereto before the deal was made, but this was denied, and consequently merely created a conflict in the evidence. It is further claimed by appellant Graham that defendant Doyle was plaintiff's agent exclusively and not his; that all the alleged fraudulent representations were made to plaintiff by defendant Doyle and were unknown to him. We think this is answered by the evidence that appellant Graham knew that all the money which was to be used for the purchase of the property belonged to plaintiff, McClure; that the deal was handled by him; that he arranged with defendant Keddie to have the title to the property passed to him by a deed of trust which concealed any interest that he (Graham) had in the property. Further, that his real interest therein was represented by the holding agreement between himself and defendant Doyle on the one side and the beneficiaries named in the trust deed on the other; that by this means he was secretly using plaintiff's money for his own benefit. Therefore it is a logical conclusion that appellant Graham and defendant Doyle were acting in harmony to defraud plaintiff and respondent, and did thereby defraud her of the sum of $12,500.

It is further claimed by appellant Graham that he is entitled to a credit on the judgment in the sum of $1,000 paid by respondent, McClure, in March, 1932, at the request of defendant Doyle, for the purpose of saving the investment already made by respondent. The money was paid into the hands of Doyle and used by the latter and Graham in furtherance of the fraud, and both parties are therefore liable for the sum so paid.

[3] Another claim advanced by Graham is to the effect that the sum of $957.50 paid by Graham and Doyle to respondent as rental should also be credited on the judgment. At the time the money was paid respondent was the equitable owner of the apartment house and entitled to the sum of money thus paid. The evidence of both Graham and Doyle stated that the money thus paid was rental. We are of the opinion that the point is without merit.

We come now to a consideration of the appeals by the defendants Northern Counties Title Insurance Company, a corporation, hereinafter referred to as the "title company," Alex Keddie and E. J. Egan. The undisputed evidence in relation to the connection of these defendants with the cause of action may be epitomized as follows: Appellant Keddie was during all of the times mentioned secretary of the title company, and appellant Egan was an employee of said title company. When respondent gave her first check for $1,000 to defendant Doyle, the latter indorsed the same to the title company, but delivered it to appellant Graham, who in turn delivered it to Keddie. It is clear that this check was a deposit by respondent on the purchase price of the three apartment houses, and, when the purchase was no longer under consideration by appellants Graham and Doyle, the $1,000 was returned to Graham by Keddie. The next appearance by any of these three appellants was about August 4, 1931, when Graham met Keddie on the street and requested the latter to hand to the City Title & Insurance Company, another corporation, three checks payable to the latter corporation. Two of them aggregated $10,500, and were signed by respondent. The third was for the sum of $500 and signed by Graham. At this conversation Graham advised Keddie that he had a deal on for a lady client who did not want her name known in the transaction and asked if the title company could act as a beneficiary in a trust deed. Keddie replied that it could not. It was then agreed between Graham and Keddie, as an act of accommodation to the former, that a trust deed should be executed in which one Warfield should appear as trustor, the title company as trustee, and Keddie and Egan as beneficiaries under the designation "trustees." A holding agreement was to be executed at the same time, which would recite that Keddie and Egan were acting as trustees for Doyle and Graham. A chattel mortgage on the furniture in the apartment house was also executed by the same parties as additional security. All of the instruments were executed and delivered to the City Title & Insurance Company, which acted as escrow holder in the matter. These instruments were later recorded at the request of the title company, except the holding agreement, which was not recorded. The amount specified in the trust deed and chattel mortgage was $17,000. It is not clear just why this figure was used instead of the $10,500 paid by respondent, but at one place in the testimony of Graham the additional sum was said by him to be a profit to respondent.

It is undisputed that at the time Graham asked Keddie to deposit the checks with the City Title & Insurance Company he did so and gave the receipt of the title company therefor, as well as delivered the instructions of Graham to the City Title & Insurance Company, one of which was that the instruments were not to be recorded except under the instructions of Graham. All subsequent handling of the money was through the escrow by the last-named company. It is also undisputed that neither of these three appellants ever received any consideration for the transaction. It is true, however, that Keddie and Egan made the affidavit of good faith to the chattel mortgage without any investigation as to the truth of the facts stated therein. It is also true that there is an entire lack of evidence that Keddie intended to defraud, unless there is an inference that his failure to inquire concerning the transaction constituted fraud. It was stipulated that, if Egan were present at the trial, his evidence would have been the same as that of Keddie. It is also undisputed that respondent never met Keddie or Egan.

[4] We have stated above all of the material evidence, and the question now presents itself, Does such evidence sustain the findings of the court that the title company, Egan, or Keddie were guilty of fraud, or conspired with the codefendants to commit fraud? After reading the entire record in this case, including all the evidence, we are satisfied neither Keddie nor Egan were guilty of fraud or of any conspiracy with their codefendants to commit fraud; that in their part of the transaction set forth in the complaint they were merely acting as an accommodation to their codefendant Graham, and that respondent, McClure, was relying upon Graham and Doyle. We are of the opinion that the following cases are in point:

Ryder v. Bamberger, 172 Cal. 791, at page 800, 158 P. 753, 756, where it is said: "For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness."

Adkins v. Potter, 211 Cal. 512, at page 519, 296 P. 285, 288, where it is said: "Even assuming without deciding that an inference of participation by either of the Potters in the fraudulent conduct of Wilbur could be drawn from the evidence, the inference of nonparticipation on their part is at least equally reasonable and equally susceptible. If either conclusion is equally reasonably inferable, 'the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing.'"

Arakelian v. Sears, 53 Cal. App. 646, at page 653, 200 P. 757, 761, where it is said: "The law presumes that a person is innocent of crime or wrong; that private transactions have been fair and regular; that the ordinary course of business has been followed (section 1963, Code Civ. Proc.); and inference of good faith rather than fraud should be indulged, and the presumptions against fraud must be overcome by him who alleges improper conduct (Levy v. Scott, 115 Cal. 39, 46 P. 892), or as stated in Roberts v. Burr, 135 Cal. 156, 67 P. 46, 'the evidence of the facts and circumstances, taken together, must amount to proof of fraud, and not to a mere suspicion thereof.'"

Best v. Paul, 101 Cal. App. 497, at page 499, 281 P. 1089, 1090, it is said: "The presumption against fraud approximates in strength the presumption of innocence of crime (27 Cor. Jur. 44, § 170; Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26), and this presumption is evidence."

Bahen v. Furley, 44 Cal. App. 134, 186 P. 185. The principle involved is the same as in the case at bar, and is declared in the syllabus as follows: "Where property is acquired from the owner through fraud and deceit and title is taken in the name of one not a party to the fraud, but the latter has no knowledge or notice of the fraudulent transaction and does not participate in any of the proceeds from the subsequent disposition of the property, he cannot be held liable to the defrauded owner in an action for damages because of the fraud." This case is also authority upon the point that under the above circumstances the party in whose name the title is taken is not put upon inquiry as to the fraud committed by others and of which he had no knowledge. In the case at bar there is an entire lack of evidence of knowledge on the part of either Keddie or Egan of the fraud perpetrated by Graham and Doyle. It also appears that neither received any of the proceeds of the fraudulent transaction. We are of the opinion that appellants Keddie and Egan are entitled to a reversal of the judgment as to each one of them.

If we are correct in our analysis of the evidence that neither Keddie nor Egan were guilty of fraud or of a conspiracy to commit fraud, it necessarily follows that the judgment against the appellant title company must be reversed.

Other questions have been presented by the briefs of the parties, but, under the conclusions above reached, it becomes unnecessary to consider them.

The judgment against John C. Graham is affirmed, respondent to recover her costs as to him. The judgment against the Northern Counties Title Insurance Company, a corporation, Alex Keddie, and E. J. Egan is, as to each one, reversed, with directions to the trial court to enter judgment in their favor, with their costs.

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9 Cal.App.2d 586

GUISTI et al. v. CARLOTTI et al.

Civ. 1383.

District Court of Appeal, Fourth District, California.

Oct. 19, 1935.

Automobiles 🔑244(36)

Evidence that motorist could have easily avoided intersectional collision with truck by slowing down or slightly deflecting his course sustained finding that motorist's intoxication was proximate cause of collision, authorizing recovery against motorist by his guest.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Carmelo Guisti and another against Ralph Carlotti and others. From a judgment rendered against all defendants, some of defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco, and Chester O. Hansen, of Fresno, for appellants.

Harold M. Child and Samuel F. Hollins, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal by Ralph Carlotti and Pete Bandoni from a judgment of $2,500 rendered against all defendants because of injuries received by plaintiff Carmelo Guisti while riding in an automobile as a guest of Ralph Carlotti. The automobile was owned by Pete Bandoni and was being driven by Carlotti with the consent of Bandoni. It collided with a truck owned by Frontier Farms, Inc., and driven by its employee, Ross Giffin.

The complaint alleged the intoxication and willful misconduct of Carlotti, and the negligence of Giffin, as the proximate causes of the accident. The following special interrogatory was submitted to the jury by appellants: "Was defendant Ralph Carlotti intoxicated, as defined in these instructions, at the time of the accident?" This was answered in the affirmative, with one juror voting "No."

Appellants maintain that the evidence was insufficient to support the verdict and judgment. They urge that the evidence shows that Carlotti was not intoxicated, but that, if intoxicated, such intoxication was not a proximate cause of the accident. They further urge there was no evidence of willful misconduct on his part.

The evidence on the question of Carlotti's intoxication is sharply conflicting. No good purpose could be served by detailing it here. It should be sufficient to state that there is ample, competent, and material evidence in the record to support the special verdict of the jury and the implied finding by the trial judge when he denied the motions for nonsuit, for a directed verdict, and for a new trial, that Carlotti was intoxicated at the time of the accident.

The contention that the intoxication of Carlotti was not a proximate cause of the accident requires us to consider the evidence bearing on this subject. It is sharply conflicting and we will devote our attention to that part of the evidence tending to support the judgment as we are not concerned with conflicts in the evidence on this appeal.

Dos Palos avenue is a public highway of Fresno county running in a general northwesterly and southeasterly direction through the town of Mendota. It is intersected at right angles by Derrick avenue. During the trial the witnesses assumed that these streets ran north and south and east and west. For convenience, we will make the same assumption. Dos Palos avenue has a hard surfaced strip about 19 feet wide along its center. It has an oiled strip about 5 feet wide along the east edge, and another 7 feet wide along the west edge of the pavement. Derrick avenue has a hard surfaced strip ranging from 21 to 27 feet in width with oiled shoulders on either side, each ranging in width from 7 to 11 feet. The four corners of the intersection are not right angles. The edges of the improved portions of the street return towards each other on broad curves forming the corners of the intersection. While the exact figures are not in the record, it appears that all of the intersection is either paved or oiled, and Derrick avenue for some distance east of Dos Palos avenue has a paved or oiled surface at least 55 feet wide. Boulevard stop signs are placed on Derrick avenue on both sides of Dos Palos avenue.

At about 5 o'clock on the afternoon of November 18, 1932, Carlotti, with Mrs. Guisti and G. Carlotti, his father, as his passengers, was driving a Ford coupé north on Dos Palos avenue approaching the intersection. At the same time the truck driven by Ross Giffin was approaching the intersection from the east on Derrick avenue. The truck slowed down but did not stop at the east edge of the intersection. It proceeded across the intersection at a speed of from 3 to 5 miles an hour. The Ford proceeded on its way and crashed into the center of the truck. When the vehicles came to rest, the truck was headed slightly north of west with its front about even with or slightly east of the west edge of the pavement on Dos Palos avenue. The Ford had its left wheels slightly west of the center line of that pavement. Giffin testified that when the truck entered the intersection he saw the Ford between 175 and 200 feet south on Dos Palos avenue traveling at a speed of not more than 40 miles an hour. A majority of the witnesses placed the speed of that car between 20 and 35 miles an hour.

With this evidence before them, were the jury and the trial judge justified in concluding that the intoxication of Carlotti was a proximate cause of the accident? Plainly there is but one answer to this question. He should have realized his danger when the truck proceeded into the intersection and he was 175 feet away. He could have stopped or so reduced his speed as to permit the truck to clear the east half of Dos Palos avenue before the Ford arrived. At the time of the collision the rear of the truck was only about 5 feet east of the center of Dos Palos avenue. A slight deflection of the course of the Ford to the east would have permitted it to pass safely to the rear of the truck without even approaching the edges of the improved portions of the roads. These simple measures of precaution, and others, should have been clearly evident to any driver in possession of his normal faculties. Carlotti did not avail himself of any of them, but continued on his course and blindly drove into the side of the truck. The jury was justified in concluding that his intoxication had so dulled his senses that he either did not see or did not realize the danger in front of him, or, if he did, he could not sufficiently control his faculties to avoid it. This is but another way of saying that the jury and the trial judge were fully justified, by the evidence, in concluding that the intoxication of Carlotti was a proximate cause of the accident and of the injury to Mrs. Guisti.

Appellants place considerable reliance on the following testimony of Mrs. Guisti: "Q. And there was nothing about his driving after you left the service station and up to the time the cars came together that would indicate to you he was intoxicated, was there? A. No." This should be construed as nothing more than the expression of an opinion on the part of the witness. She was sick and paying little attention to Carlotti and his driving. She also testified: "Q. He wasn't driving so fast that your attention was attracted to the driving? A. I wasn't looking at all; I was talking to the old man there. When I first look up the truck was right in front of me."

Since we have concluded that the evidence supports the conclusion that Carlotti was intoxicated, and that his intoxication was a proximate cause of the injury of Mrs. Guisti, the judgment must be affirmed. This makes unnecessary any consideration of the question of willful misconduct.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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9 Cal.App.2d 567

WELBORN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10305.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1935.

Master and servant ⇨405(6)

Evidence *held* to justify award of Industrial Commission that employee, sustaining injury from fall, had suffered temporary total disability for 2½ weeks and had sustained no loss of earnings thereafter.

Petition under the Workmen's Compensation Act by H. P. Welborn to review the order of award granted to him by the Industrial Accident Commission.

Award affirmed.

Fred M. Riedman, of Long Beach, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

SHINN, Justice pro tem.

Petitioner, when 67 years of age, was injured by a fall down the side of a steep roof on to a lower roof. The injury occurred during the course of, and it arose out of, his employment in construction work being done on a church. He sustained injury to his right shoulder, which caused pain and inflammation of the muscles, and restricted the motion of his arm. He was examined by physicians 2 months after his accident. They found him still suffering from his injury, and were of the opinion that temporary total disability would probably continue for a period of from 3 to 6 months after the date of the examination. They further found that he then was, and probably had been for one month, able to act as timekeeper, also as purchasing agent in the generally accepted definition of those terms, but that he was not able to earn a living as a laborer or by muscular effort. The physicians treated him for some months, at the end of which period, while very much improved, he was not yet well. It appeared that the employment in which petitioner was engaged would have continued for 2 4/7 weeks after his injury, when the work would have been completed. Petitioner has received medical treatment and was awarded compensation for his injury for 2 4/7 weeks. After denial of his petition for rehearing by the Industrial Accident Commission, petitioner prosecuted this proceeding to review the order of award, and claims that the evidence shows without conflict that he suffered compensable temporary total disability for some 6 months, and partial disability up to the time of the hearing, some 4 months later. Petitioner had been in the mercantile business, but for some 4 years prior to his employment in question had had no employment, except that "he put on and helped out on a few sales," in the mercantile business. In his application for compensation he designated his employment at the church as "general manager and timekeeper of job," although it appears that, during the work, he did odd, light jobs of a general nature, such as helping to put sheathing on the roof, some painting on the roof, and in looking up materials and keeping the time of the men.

The commission found that petitioner suffered temporary total disability for 2 4/7 weeks and sustained no loss of earnings thereafter. If there is evidence to sustain this finding, the award must stand. This is the only question presented. After his injury, petitioner went to the job each day until it was finished and kept the time of the men, but he did not include his own time in the pay rolls. There is nothing in the record to show that at the expiration of the 2 4/7 weeks petitioner was unable to follow the occupation in which he was injured. He was neither an artisan nor a laborer, nor was he employed as such. The evidence fairly shows that his duties did not call upon him to perform manual labor. Others were employed for that purpose. The very meager statements of petitioner as to the help he gave to the skilled workmen show that his assistance was given voluntarily and that it was wholly inconsequential. In order to uphold petitioner's contention, we would have to find that the evidence shows without substantial conflict that petitioner was engaged in manual labor at the time of his injury and in an occupation which he was unable to resume on account of his injuries. The record does not warrant such a holding. The evidence supports the findings of the commission which were adverse to petitioner upon this question of fact.

The award is affirmed.

We concur: HOUSER, P. J.; YORK, J.

9 Cal.App.2d 419

SHOCKLEY et al. v. ELMORE et al.

Civ. 1192.

District Court of Appeal, Fourth District, California.

Oct. 9, 1935.

1. Chattel mortgages 🔑6

Bill of sale given to seller by assignees of conditional sales contract who were in default, which provided that bill should be void upon payment of past-due balances under contract, *held* security for debt owing from assignees to sellers.

2. Sales 🔑481

In action by buyers under conditional sales contract against sellers for recovery of property, which was in sellers' possession, with damages for its detention, evidence *held* insufficient to support findings upon which judgment in favor of buyers was based.

3. Sales 🔑481

In action by buyers under conditional sales contract against sellers for recovery of property, which was in sellers' possession, with damages for its detention, trial court should have taken cognizance in judgment of amount unpaid on contract which was not in serious dispute.

4. Replevin 🔑8(4)

Action for recovery of personal property with damages for its detention can be brought by person entitled to immediate possession of property.

5. Appeal and error 🔑95, 110

Order bringing in new parties defendant and order denying motion for new trial are not appealable (Code Civ. Proc. § 963, as amended by St. 1933, p. 2472).

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Joseph Shockley and another against E. H. Elmore and I. S. Lambing, individually and as copartners doing business under the firm name and style of the Elmore Lambing Oil Company. From the judgment, the defendants appeal.

Reversed.

See, also, (Cal. App.) 45 P.(2d) 1021.

Hunter M. Muir, of San Diego, for appellants.

Ed. P. Sample and William H. Wylie, both of San Diego, for respondents.

MARKS, Justice.

This action was brought for the recovery of personal property, together with damages for its detention. The trial court gave judgment for plaintiff for recovery of the property, or its value of $400, if delivery could not be had, and damages for its detention in the sum of $1,050.

Defendants are dealers in gasoline, oils, and other petroleum products. Plaintiffs desired to purchase a service station on East University avenue in the city of San Diego. This station was owned by Mrs. Louise Evans and was situated on real estate leased from Joseph E. and Clara Kimpton. Plaintiffs negotiated with defendants to secure money with which to acquire the service station with the following results: Plaintiffs secured a lease on the real property from Mr. and Mrs. Kimpton; defendants purchased the service station equipment from Mrs. Evans; by a conditional sales contract, defendants agreed to sell, and plaintiffs agreed to buy the service station equipment for $513.44, payable as follows: $13.44 in cash, and $500 in twenty equal payments of $25 each commencing on August 1, 1933, and on the first day of each month thereafter. The conditional sales contract was dated June 10, 1933, and plaintiffs went into possession and operated the station until October 20, 1933. During that time they paid defendants two payments of $25 each. On that day they sold their interest in the service station, together with the lease, to A. J. Danecki on a conditional sales contract. Defendants consented in writing to this sale but expressly provided that the terms of the original sales contract must be adhered to.

Danecki was associated with T. C. Burkhalter in the purchase, though the exact relation between them does not appear. They went into possession of the property and proceeded to operate it. On January 6, 1934, Danecki told E. H. Elmore that he was "broke" and wanted to turn over the keys of the service station. This resulted in the following arrangement: Defendants refused to accept the keys; Danecki and Burkhalter gave defendants a bill of sale to the service station equipment which provided that it was "given to secure equipment account of $122.73 & past due payments of $54.00 on equipment contract" and that "when said balances are paid in full this bill of sale shall be null & void." The gasoline and oil to be delivered by defendants was to be paid for daily and all other income from the station was to belong to Burkhalter, or to Burkhalter and Danecki. From January 6, 1934, Burkhalter is mentioned in the evidence as the one chiefly engaged in operating the station though it appears that Danecki worked there on occasions. It does not appear that Danecki sold or assigned his interest in it.

About March 15, 1934, either Burkhalter or Danecki telephoned Shockley and told him that the rent had not been paid to Mr. and Mrs. Kimpton and that he would have to take over the station. Shockley paid the month's rent of $50 which was then due and went to the station where he met a salesman of the defendants to whom he explained the situation. The salesman told Shockley that if he took over the station defendants would lose several hundred dollars owed them by Burkhalter and Danecki. He asked Shockley to see Mr. Elmore, which he did. Defendants repaid Shockley the $50 rent. Shockley did not take over the station, but agreed to the continued operation of it with Burkhalter in charge.

On March 22, 1934, defendants removed Burkhalter from the management of the station and put an employee of their own selection in charge.

Early in April, 1934, plaintiffs assigned their interest in the station to A. H. Dysart. There was no actual sale to Dysart, he appearing in the transaction as the representative of plaintiffs in effecting a sale and was to receive all of the purchase price in excess of $1,000. On April 7, 1934, Dysart entered into a conditional sales contract with Norman L. and W. Boyd De Hay whereby he agreed to sell the service station and assign the Kimpton lease to them for $1,000, payable, $600 in cash, and $400 in deferred payments. The transaction was placed in escrow with a title company and $200 was paid into the escrow. Under date of April 11, 1934, Dysart wrote the title company authorizing it to pay to defendants the balance of $392 unpaid on the conditional sales contract with plaintiffs upon their giving him a bill of sale of the "fixtures and equipment" in a form to be approved by Dysart and giving him peaceful possession of the property. Under date of April 10, 1934, the attorney for defendants wrote the title company informing it that Shockley had no title in the service station equipment either to sell or assign to Dysart. On April 20, 1934, the escrow was closed by the refund to the De Hays of the $200 which they had deposited in it. This action followed.

We have studied the transcript carefully and find that much is left to the imagination concerning the various transactions involved. From the evidence we think the following conclusions are justified and cannot be in serious dispute: That on January 6, 1934, there were delinquent installments due and unpaid on the Shockley-Elmore conditional contract of sale of June 10, 1933, of $40 or more and that nothing was paid on that contract after that date; that there was and is $390 unpaid on that contract; that the Shockley-Danecki conditional sales contract was in default on January 6, 1934, and that nothing was paid on it thereafter; that plaintiffs never took any steps to terminate their conditional sales contract with Danecki and were never in possession of the service station or any of the equipment in controversy here after they gave Danecki possession on October 20, 1933; that defendants took no steps to terminate their conditional sales contract with plaintiffs, at least prior to March 22, 1934. The evidence concerning the happenings at that time is too meager and uncertain to permit us to hazard a guess as to the results following the action of that day.

[1, 2] The trial court found "that on January 6, 1934, defendants without notice to the plaintiffs, but with full knowledge and notice of plaintiffs' right, title and interest in and to said personal property herein described, and at a time when the plaintiffs were not in default either as to the payments to be made under said agreement of June 10, 1933, or in the performance of any of the terms, covenants or conditions contained in said contract to be performed by plaintiffs, entered upon the premises at 4685 University avenue, San Diego, California, and took possession thereof, and of all the personal property described herein in finding 1; and that said defendants at all times subsequent to January 6, 1934, have retained possession of said personal property, and of said gasoline and oil station upon the premises at 4685 University Avenue, San Diego, California, and are now in possession thereof."

Practically all of this finding is contrary to undisputed evidence. Elsewhere the trial court found that $123.44, including the down payment of $13.44, had been paid on the contract of June 10, 1933. There were six payments of $25 each, or $150, due on the contract according to its terms not including the down payment, leaving an admitted balance of $40 in default. Defendants did not take possession of the service station on January 6, 1934. The bill of sale shows on its face that it was given as security for a debt owed by Danecki and Burkhalter. It amounted to nothing more than security between the parties for this debt. Bonestell v. Western Auto-Motive Finance Corporation, 69 Cal. App. 719, 232 P. 734, 737.

The trial court found that "said F. J. Danecki and T. C. Burkhalter, in March, 1934, with the consent of plaintiffs herein, rescinded the conditional sales contract made on or about October 30, 1933, referred to in finding VI hereof, and surrendered to the plaintiffs any and all rights that they might have in said personal property herein described by reason thereof."

This finding is without evidentiary support. We have already detailed the transactions of March 15 or 16 which left Burkhalter in charge of and operating the service station. Shockley freely admitted that neither he nor Palmer were in possession of the station at any time after October 20, 1933, and there is nothing in the record upon which a conclusion of mutual rescission of the contract can be based.

The trial court found that the reasonable value of the use of the personal property for the eight months following March 22, 1934, was $180 per month, or $1,440. This finding is also without evidentiary support. The only testimony bearing upon this subject is that of Shockley. He testified that he and Palmer operated the station from June 10, to October 20, 1933, without receiving any salary. He first testified that the "gross income" from the station was $250 per month. This he later changed to "gross profits." He admitted that about $70 per month had to be paid from these "gross profits" for rent, light, and water. He refused to say that he and his partner received for themselves as much as $50 apiece per month out of the station income. He testified that he had boarded and lodged with Palmer and that all the income from the station left after paying operating expenses had been used to pay grocery bills, rent, heat, light, and water bills. There was no attempt to prove the reasonable value of the use of the property after March 20, 1934, or the profits, if any, made by the defendants after that date. It is evident that the "gross profits" of $250 a month were not the results of the use of the personal property in question here, but in addition thereto were the results of the use of the leasehold estate, the money invested by plaintiffs in the purchase of supplies, and plaintiffs' own personal services. It should be remarked that the complaint alleged damages as follows: "That the reasonable market value and use and occupancy of said gas station is one hundred dollars ($100.00) per month" which for the eight months involved would amount to $800. The findings placed the reasonable value of the use of the personal property at $180 per month, or $1,440. The judgment gave plaintiffs damages for the detention, deprivation, and use of the personal property in the sum of $1,050, or $131.25 per month. The total value of the personal property was fixed at $400.

In Bonestell v. Western Auto-Motive Finance Corporation, supra, it is said: "Section 3359 of the Civil Code provides that 'damages must, in all cases, be reasonable' and unless the damages allowed are shown to be such as approach actual, usable, or reasonable value of the article to the owner they have no support in this section. In the case of Mutch v. Long Beach Improvement Co., 47 Cal. App. 267, 190 P. 638, the rule for determining damages in such cases as this is very clearly set forth. It is there said: 'It is the net usable value less the expense of keeping up the property which may be recovered. In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself.'" See, also, Tucker v. Hagerty, 37 Cal. App. 789, 174 P. 908; Stanley W. Smith, Inc., v. Pilgrim, 117 Cal. App. 244, 3 P.(2d) 573; Ferris v. Cooper, 125 Cal. App. 234, 13 P.(2d) 536.

[3] The trial court found there was a balance of $390 of the purchase price of the personal property unpaid from plaintiffs to defendants under the terms of the conditional sales contract. No account was made of this in the judgment which adjudged plaintiffs to be the owners and entitled to the possession of the property. The amount unpaid on the contract does not appear to have been in serious dispute and the trial court should have taken cognizance of this debt in the judgment. The findings were signed by the trial judge some time after the conclusion of the trial.

[4] Actions of this kind are merely for the recovery of possession of personal property and damages for its detention by one entitled to its immediate possession. Ownership of the property is only important when it bears on the right of possession. 5 Cal. Jur. p. 155 et seq., and cases cited. On a retrial of their case counsel should confine the evidence offered to the real issues involved.

[5] An order bringing in new parties defendant, and an order denying a motion for new trial, are not appealable. Section 963, Code Civ. Proc., as amended by St. 1933, p. 2472.

The attempted appeals from the order bringing in new parties defendant, and from the order denying the motion for new trial, are dismissed.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

9 Cal.App.2d 413

SAMPSON v. BOYSEN.

Civ. 1185.

District Court of Appeal, Fourth District, California.

Oct. 9, 1935.

Hearing Denied by Supreme Court Dec. 5, 1935.

1. Bankruptcy 🔑295

Where referee in bankruptcy returned partnership property to partner of bankrupt, after having taken temporary possession, controversy which arose between trustee of bankrupt estate and solvent partner as to whether property was in fact partnership property could be determined by state court (Civ. Code, § 3440; Bankr. Act §§ 5h, 23, 11 USCA §§ 23 (h), 46).

2. Bankruptcy 🔑288(15)

Order of bankruptcy referee of one partner ordering partnership property returned to solvent partner was not conclusive of solvent partner's right to administer property and sell it, since referee did not attempt to adjudicate matters, but granted permission to trustee to file suit against solvent partner (Civ. Code, § 3440; Bankr. Act §§ 5h, 23, 11 USCA §§ 23 (h), 46).

3. Fraudulent conveyances 🔑47

Statute making sale of fixtures of restaurant owner void as against existing creditors, in absence of prescribed notice, *held* applicable to sale of one-half interest in restaurant fixtures to party with whom debtor formed partnership few months before debtor's bankruptcy (Civ. Code, § 3440).

4. Bankruptcy 🔑183

Where sale by debtor of one-half interest in restaurant fixtures to party with whom debtor formed partnership few months before debtor's bankruptcy was void as to seller's creditors, solvent partner who sold fixtures after being given possession by bankruptcy trustee, but before determination of validity of his purchase, *held* liable to trustee for total value of fixtures (Civ. Code, § 3440; Bankr. Act §§ 5h, 23, 11 USCA §§ 23 (h), 46).

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Robert K. Sampson, trustee in bankruptcy for the estate of Marvin A. Berg, a bankrupt, against S. I. Boysen. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

See, also, 42 P.(2d) 704.

Ed P. Sample and William H. Wylie, both of San Diego, for appellant.

Seymour W. Wurfel and Charles B. De Long, both of San Diego, for respondent.

BARNARD, Presiding Justice.

The bankrupt, Berg, operated a restaurant in San Diego under the name of Berg's Café. On September 1, 1933, he sold a half interest in this restaurant, including a half interest in certain fixtures and equipment which are involved herein, to the appellant in this action. He was heavily indebted at the time, and no notice was given in accordance with section 3440 of the Civil Code. Other fixtures were added and improvements were made with money furnished by the appellant, and the restaurant business was continued without changing its name.

About three months later Berg was adjudicated a voluntary bankrupt, and the respondent, as receiver, took charge of the equipment in the restaurant. Shortly thereafter the appellant appeared before the referee in bankruptcy and requested that all of the restaurant property be turned over to him as a nonbankrupt partner, in accordance with section 23, subdivision (h), USCA, Bankruptcy, title 11. The referee ordered the property delivered to this appellant in accordance with said section, and at the same time gave permission to the respondent, as trustee of the bankrupt estate of Berg, to bring a suit in the state court for the purpose of determining what title the appellant had in the property here in question. The appellant proceeded to sell the fixtures and equipment of the restaurant, including the portion here involved, a half interest in which had been sold to him by Berg without notice and the other half of which Berg had contributed to the partnership business. This action was brought to recover the value of that portion of the fixtures which had been owned by Berg prior to September 1, 1933, and a half interest in which had been sold to the appellant. The court found for the respondent, finding the value of this portion of the fixtures to be $300, and entered judgment for that amount. This appeal followed.

[1] It is first contended that the state court was without jurisdiction to try this action and that the bankruptcy court, having taken possession of the property through a receiver, had sole and exclusive jurisdiction over any question of title or adverse claim to the property involved. The ap-

pellant relies upon certain cases in which it has been held that, where a court of bankruptcy, through its officers, takes possession of property which is then in the possession of the bankrupt, it has jurisdiction to hear and determine the adverse claims of other parties and its possession cannot be disturbed by the process of another court. In such cases the property in question was in the exclusive possession of the bankrupt at the time it was taken over by the officers of the bankruptcy court. We are here dealing with property which was in the possession of a partnership, only one member of which has been adjudicated a bankrupt. Subdivision (h) of section 23, USCA, Bankruptcy, title 11, provides a method for handling partnership property in such a case, but makes no provision for determining a controversy as to whether particular property is, in fact, partnership property. There is a distinction between property which the bankruptcy court takes from the possession of an individual bankrupt and property which is found in the possession of a partnership only one member of which is going through bankruptcy proceedings. The federal statute just referred to provides that in the latter case the partnership property shall not be administered in bankruptcy except with the consent of the solvent partner. In Marnet Oil, etc., Co. v. Staley (C. C. A.) 218 F. 45, 48, the court said: "The plain language of this provision negatives the existence of a right of the court as a court of bankruptcy to draw to itself the administration of the partnership estate when only one of the partners has been adjudged bankrupt, except in the event of the partner or partners not adjudged bankrupt consenting to its doing so. The right in such a case of a solvent partner to have the partnership business administered elsewhere than in bankruptcy is absolute unless waived by him."

In the instant case a partnership existed between the appellant and Berg, the property was in the possession of this partnership, and the appellant did not consent to an administration by the bankruptcy court, but demanded a return of the property to him in accordance with the statute, which demand was complied with. Neither the temporary possession of the receiver nor the partial right of possession of the insolvent partner at the time the property was taken charge of by the bankruptcy court gave that court exclusive jurisdiction of the claim which afterwards arose, but, as matters then stood, the statute referred to was controlling, and the appellant was entitled to a return of the property in order to settle the partnership business and account for any interest of the bankrupt partner.

In this situation a controversy arose between the trustee and the solvent partner as to whether this particular property was, in fact, partnership property. Under the plain provisions of section 46, USCA, Bankruptcy, title 11, jurisdiction of an action to determine such a controversy was in the state court.

[2] It is next urged that the order of the referee ordering the property returned to the appellant, as solvent partner, is binding and conclusive upon the respondent as to appellant's right to administer the property and sell the same, and that the same is a complete bar to the present action. In support thereof, appellant cites the case of Martin Music Co. v. Robb, 115 Cal. App. 414, 1 P.(2d) 1000, as holding that an order of a referee allowing a claim operated as an estoppel and was a bar to a subsequent suit on the contract out of which the claim originated. An entirely different situation here appears. In this case, the parties were partners, the property was partnership property until and unless the sale was set aside, and the appellant had not submitted to the jurisdiction of the bankruptcy court. Under section 46, title 11 USCA, above referred to, the referee had no jurisdiction to settle the question which had arisen or to pass upon the appellant's claim of title to the property. He could only set it over to the solvent partner in accordance with the provisions of subdivision (h) of section 23. This he did without attempting to pass upon the title to the property or upon any claim of this other party, and, at the same time, he gave permission to the trustee to bring suit in the state court for the purpose of determining any such controversy. The referee neither had authority to nor attempted in any manner to protect the appellant in anything he might do with respect to the property, but, on the contrary, the appellant was expressly warned that his rights in the particular property were to be contested, since permission to file a suit was given at the time the property was released to him in accordance with his demand.

[3] After finding that no notice was given of the sale of the half interest in

the property here in question to the appellant, the court found as a conclusion of law, that, because of the failure to give such notice, the purported sale by Berg to the appellant of an undivided one-half interest in and to this property was fraudulent and void as against the individual creditors of Berg, who were such on and prior to September 1, 1933. The appellant contends that this conclusion is erroneous and that section 3440 of the Civil Code has no application, since the sale in question was of a half interest in the fixtures only. We are cited to no cases in this state, but in Daly v. Sumpter Drug Co., 127 Tenn. 412, 155 S. W. 167, 169, Ann. Cas. 1914B, 1101, in passing upon a similar contention under a somewhat similar law, the court said: "The sale of a half interest by a merchant for the purpose of taking the vendee into partnership is within the purpose and reason of the act, since it very materially changes the relation of the vendor's creditors to the stock, if such sale is valid. Before the sale a creditor could levy upon the whole stock. After the sale, if valid, the creditor of such vendor could not levy upon any of the stock, but only upon the vendor's interest in the whole, and in order to obtain this he would have to file a bill in equity and have an accounting with the new partner. So the former owner of the stock might admit three new persons into the business, and so reduce his own holding to a one-fourth interest, and so on as to smaller fractions—at the same time putting the proceeds into his own pocket and holding them beyond the reach of his creditors." Section 3440 of the Civil Code makes the sale of the fixtures of a restaurant owner void as against existing creditors unless the prescribed notice is given. Every reason for such a statute applies with equal force to the sale of a half interest in such fixtures, especially where the entire ownership of the fixtures is actually transferred to a partnership. Such a sale materially affects the relation of the vendor's creditors to the property. In our opinion, such a sale is within the purpose and intent of the statute and is covered thereby.

[4] It is finally urged that, since the appellant only acquired an undivided one-half interest in these fixtures through the sale which was set aside, the judgment against him should have been for only one-half of the value of the fixtures, or $150. The appellant did not merely sell the one-half interest which he claimed to have bought, but sold the entire property, to all of which the trustee was entitled. Having wrongfully taken and disposed of the property, the appellant was liable for the value thereof.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

PEOPLE v. BURKHARDT. *

Cr. 2749.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1935.

Hearing Granted by Supreme Court Nov. 4, 1935.

Criminal law 🔑200(1)

Prior conviction of defendant under ordinance making it unlawful for intoxicated person to remain in public place *held* to bar prosecution for driving automobile while intoxicated, founded on acts forming basis of conviction of violating ordinance (St. 1923, p. 553, as amended by St. 1929, p. 537).

CRAIL, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Thomas H. Burkhardt was convicted of driving an automobile while under the influence of intoxicating liquor, and he appeals.

Reversed.

Frederic H. Vercoe, Public Defender, and Richard F. Bird, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was accused in the superior court of the violation of section 112 of the California Vehicle Act (St. 1923, p.

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*For subsequent opinion see 55 P.2d 846.

553, as amended by St. 1929, p. 537), it being specifically set forth in the information that on March 7, 1935, he drove an automobile "upon a public highway while under the influence of intoxicating liquor." Defendant pleaded a former conviction of the offense charged, and the trial court found "for the people" on this plea. At the trial it was stipulated that defendant on March 8, 1935, in the court of the justice of the peace at El Monte, pleaded guilty to the charge of "being drunk in an automobile upon a public highway," in violation of the provisions of a county ordinance, the acts forming the basis of the charge in the justice's court being also the foundation of the charge in the superior court. The county ordinance was not introduced in evidence and we must therefore consider the question involved on the basis of the stipulation.

Appellant maintains that his plea of former conviction should have been upheld on the ground that every element constituting the offense in the justice's court is necessarily an element in the offense charged in the superior court and therefore the latter charge includes the former. Innumerable decisions have been made on the subject of former jeopardy by our own courts and those of sister states. As said in People v. Defoor, 100 Cal. 150, 34 P. 642, 643, "The circumstances under which courts have been called upon to determine what facts constitute the same offense have been so different and numerous that the authorities upon this subject are seriously conflicting, so far as the general question is concerned."

The California case most like the present one is that of People v. McDaniels, 137 Cal. 192, 69 P. 1006, 1007, 59 L. R. A. 578, 92 Am. St. Rep. 81. In that case defendant pleaded guilty to the charge of battery before a justice of the peace and later was found guilty in the superior court of the crime of assault with a deadly weapon with intent to commit murder. In reversing the judgment the court said: "Battery includes and implies an assault, for there can be no battery without an assault. What the defendant did, therefore, may have constituted a simple assault, or assault and battery, or assault with intent to murder. * * * The prosecution before the justice of the peace was for the same acts of the defendant, but the complaint and judgment omitted the alleged intent to murder charged in the information. The identity of the acts of the defendant in the two cases is not questioned, and the defendant has therefore been convicted of the assault which is an essential fact to be proven under the information; the intent to murder not being a crime in the absence of some physical act constituting an assault. It is well settled that a conviction of a lower offense embraced in a higher one, for the commission of which a defendant was tried, is an acquittal of the higher offense, and an independent trial and conviction of the lower offense, when pleaded, must, upon the same principle, be a bar to the prosecution for the higher offense which included it." The same principle is followed in People v. Defoor, supra, wherein the court said: "The case, therefore, stands precisely as though the first information had been for an assault. The defendant having been convicted for that offense, he could not be prosecuted for mayhem committed during the same assault without violating the constitutional provision which protects him against being twice convicted of the same offense,—a provision as important, and to be as sacredly regarded, as the right of a trial by jury, or any other constitutional provision intended for the protection of the life, liberty, or property of a citizen." A line of cases giving much force to defendant's argument is that in which it is held that a person accused of murder and convicted of manslaughter cannot be again tried for murder even though the defendant himself asks for a new trial. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Smith, 134 Cal. 453, 66 P. 669; People v. McFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L. R. A. 245. In Re Application of O'Connor, 80 Cal. App. 647, 252 P. 730, 731, the rule is stated as follows: "In a case where one is convicted of an offense necessarily included within another, and later is prosecuted for the greater, a plea of once in jeopardy will be sustained, for such conviction might have been had under the latter. The converse would also be true if the prosecution had begun with the greater offense, and there had been an acquittal, and subsequent prosecution attempted under the lesser charge."

Application of the rule of the McDaniels Case, supra, and a comparison of the facts of that case with the facts of the case before us lead to the conclusion that the judgment must be reversed. In each case the defendant pleaded guilty to a misdemeanor in the justice's court; in each case the act punished in the justice's court was necessarily included in the offense charged in the superior court; and in each case it was necessary to prove an additional fact to constitute the crime prosecuted in the later action. In the McDaniels Case the assault was the foundation of the charge in the justice's court and it became necessary to prove an additional fact, the intent, to constitute the second offense charged. In the present case drunkenness in an automobile on a highway was the foundation of the charge in the justice's court and it became necessary to prove an additional fact, driving the automobile, to constitute the second offense charged.

The judgment is reversed.

I concur: McCOMB, Justice pro tem.

CRAIL, Presiding Justice.

I dissent.

The defendant drove an automobile while intoxicated and while doing so injured a child and was found guilty of violating section 112 of the California Vehicle Act. On this appeal he does not question the sufficiency of the evidence and advances only one ground to support his plea for reversal, i. e., that he had been previously convicted in the justice's court of "being drunk in an automobile upon a public highway as said offense is defined in Ordinance No. 1735 of the County of Los Angeles."

It does not help the defendant to say that this ordinance was not introduced in evidence. The burden was on him to prove the former jeopardy, and if the ordinance is not in the evidence, he failed to prove his defense of former jeopardy. All intendments and presumptions must be indulged in favor of the judgment of the superior court. But let us stretch a point in defendant's favor and assume that the ordinance is included in evidence by reason of the stipulation. There is no question about the wording of the ordinance. It reads as follows: "Section 1. It shall be unlawful for any intoxicated person, or any person in an intoxicated condition, wilfully to appear, remain, or be in or on any public highway, street, alley, way, park, playground, or public place in the unincorporated territory of the County of Los Angeles whether such person is or is not in or upon any automobile, street or interurban car, vehicle, or conveyance. Section 2. Any person violating any provision of this ordinance shall be deemed guilty of a misdemeanor," etc.

It will be observed that it was not necessary for the defendant to commit any act in order to be guilty of the offense defined in the ordinance. It was only necessary for him to remain or be in a public place "whether such person is or is not in or upon any automobile, [or] street." The act of becoming intoxicated is no part of the offense. The ordinance makes it unlawful for certain persons, i. e., intoxicated persons, to remain or be in a public place, and by the very language of the ordinance it is clearly immaterial "whether such person is or is not in or upon any automobile [or] street." In order to be guilty under section 112 of the California Vehicle Act, a person must commit an act, i. e., drive a vehicle on a public highway. It seems clear to me that the prior conviction did not constitute a former jeopardy for the reason that it not only did not necessarily include any automobile or any highway, but did not include any act whatever. Certainly it did not include, neither was it included in, the act which is the gravamen of the offense defined in section 112.

In this connection it might be well to inquire by whose direction the words, "in an automobile upon a public highway," were inserted in the complaint in view of the fact that by the very language of the ordinance such matters are immaterial.

Viewing the case as I do, the judgment should be affirmed.

Ex parte MURDOCK. *

Cr. 2748.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1935.

Hearing Granted by Supreme Court Nov. 14, 1935.

Habeas corpus ⚷113(5)

Final order of superior court in habeas corpus proceeding discharging accused who was held under warrant of extradition, which recited that accused was charged with felony of escaping from Montana state prison, *held* not appealable by people, since not a discharge after conviction of offense prosecuted by indictment or information notwithstanding accused at time of escape was serving term for such offense (Pen. Code, § 1506).

YORK, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in the matter of the application of Shelby Murdock for a writ of habeas corpus. Shelby Murdock was discharged from custody, and the People appeal.

Appeal dismissed.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Harold Judson, of Los Angeles, for respondent.

SHINN, Justice pro tem.

After a hearing on habeas corpus before the superior court of Los Angeles county, respondent Shelby Murdock was discharged from custody under a warrant of extradition issued by the governor of California upon requisition of the governor of Montana. The matter is before us upon an appeal initiated by the people.

We are met at the outset with the question whether the case is one in which the people may appeal. If the right exists, authority therefor must be found in section 1506 of the Penal Code. Under this section the people may appeal from a final order of the superior court in a habeas corpus proceeding, discharging a defendant after conviction in a court of record of an offense prosecuted by indictment or information. If any of these conditions is lacking, the right does not exist.

It appears from the recitals of the warrant of extradition that respondent has been charged in the state of Montana with the crime of escaping from a state prison, a felony; that he fled from justice in that state and has taken refuge in the state of California and by the return to the writ it is shown that he is held under the warrant upon requisition for the same by the governor of Montana on and for a charge of escape from a state prison. These facts afford the basis of the extradition proceedings. They give to respondent a status of one charged with a felony in another state, of which he stands not only unconvicted, but untried. If we look no further, we have nothing before us which brings the case within the provisions of section 1506 because there has been no conviction of the defendant of the crime charged. We are asked by appellant to give consideration to the fact that respondent, at the time of his escape, was serving a term in a state prison after conviction of forgery, a crime prosecuted by indictment or information in a court of record. It is argued that this fact, which is admitted by respondent, brings the case within the provisions of the section. We have reached a contrary conclusion. The conviction that must be shown is one under which the defendant is held in custody and not a conviction of some other, unrelated crime. A contrary construction might extend the terms of the section to cases in which the accused had suffered a former conviction and perhaps had satisfied the judgment by serving out the full term of his sentence. The purpose of the statute is to give to the people the right of appeal from an order of discharge on habeas corpus which would nullify conviction of the accused and to withhold the right where the prisoner is discharged before conviction. The underlying reason is that there is no finality to a discharge on habeas corpus prior to trial, whereas a discharge after conviction would ordinarily operate as an acquittal. Separate convictions of other crimes unrelated to the custody from which the prisoner is discharged have nothing to do with the matter. Respondent is not held in custody upon a charge of forgery, his return to Montana is not sought upon a charge of which he has

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 55 P.2d 843.

been convicted, nor is it demanded upon the basis that he is wanted there to serve out the remainder of a term in the prison from which he made his escape. With relation to the question of the right of the people to appeal in this proceeding, the case is no different from one in which the prisoner is accused for the first time, and then of the offense under which his extradition is sought. Therefore the order appealed from is final and may not be reviewed by this court.

The appeal is dismissed.

I concur: HOUSER, P. J.

I dissent: YORK, J.

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9 Cal.App.2d 431

PEOPLE ex rel. McGROARTY v. CITY OF LOS ANGELES.

Civ. 9561.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1935.

Rehearing Denied Nov. 8, 1935.

Hearing Denied by Supreme Court Dec. 9, 1935.

1. Municipal corporations 🔑33(1)

In proceeding to consolidate contiguous cities, jurisdiction of council of city having lesser population to act on petition for consolidation is conditioned upon establishment of facts that cities are contiguous, that relative population of each has been established, and that petition has been signed by required number of qualified electors of smaller city (Gen. Laws 1931, Act 5166, §§ 2, 5).

2. Evidence 🔑31

Acts of Legislature in incorporating cities and establishing their boundaries are recognized by judicial bodies without proof, and therefore proof of territorial contiguity of cities seeking to consolidate is not essential (Gen. Laws 1931, Act 5166, §§ 2, 5).

3. Municipal corporations 🔑34

Under act authorizing consolidation of contiguous cities and permitting assumption of certain indebtedness upon proper recital in petition for consolidation, absence of proof of status and purpose of certain bond issue *held* not to deprive council of jurisdiction to call election on question of consolidation and did not invalidate proceeding (Gen. Laws 1931, Act 5166, §§ 2, 5).

4. Certiorari 🔑68
Quo warranto 🔑57

In certiorari proceeding, reviewing court merely inspects procedure and never acts as an appellate tribunal as to truth of lower court's findings, but in quo warranto, jurisdiction, together with truth of requisite facts, may be put in issue.

5. Officers 🔑103

Rigid rule respecting procedure before official bodies, which are chiefly political in their character and powers and which only occasionally exercise judicial functions, has been relaxed with view to upholding action of such bodies in order to advance public welfare.

6. Municipal corporations 🔑34

Certificate of election consolidating contiguous cities *held* not fatally defective for failure to recite after stating that consolidation proposition carried, that municipal indebtedness was assumed, since consolidation and assumption of indebtedness was indivisible matter (Gen. Laws 1931, Act 5166, §§ 2, 5).

7. Municipal corporations 🔑34

Failure of city clerk after passage of resolution declaring result of election to consolidate contiguous cities to enter proceedings in full upon minute book *held* not to invalidate proceeding, since clerk's omission was mere failure to perform ministerial act (Gen. Laws 1931, Act 5166, §§ 2, 5).

8. Municipal corporations 🔑34

Where resolution declaring result of election to consolidate contiguous cities was correct in form, error, if any, in attaching emergency clause to resolution *held* cured where resolution was filed with secretary of state 30 days after enactment of ordinance to which emergency clause was attached (Gen. Laws 1931, Act 5166, §§ 2, 5).

9. Elections 🔑298(1)

Election laws are to be liberally construed to end that expressed will of electors will not be vitiated by any court because of any error committed in course of election, so long as error complained of is not one which was likely to change result of election or one actually affecting result of election.

10. Municipal corporations 🔑34

Provision of act relating to consolidation of cities that, in event any election authorized thereunder is not called or held in manner or within time specified therein, all proceedings relating to such consolidation shall be void *held* inapplicable to inconsequential variance in actual election (Gen. Laws 1931, Act 5166, §§ 2, 5, 7).

11. Statutes 🔑227

Established rule of construction that, where legislative provision is accompanied with penalty for failure to observe provision, provision is mandatory, is not absolute to least variation.

12. Municipal corporations 🔑34

That one of cities voting on question of consolidating with contiguous city conducted election with only one inspector, one judge, and two clerks instead of one inspector and two judges, as required by Consolidating Act, *held* not to invalidate proceeding where it did not appear that variation affected result of election (Gen. Laws 1931, Act 5166, §§ 2, 5, 7; Act 5229).

13. Municipal corporations 🔑33(1)

Attempt to do more than law authorizes does not invalidate that which was authorized, but invalidates only that for which there was no statutory authority, as regards proceeding for consolidation of cities.

14. Municipal corporations 🔑36(3)

Where act providing for consolidation of contiguous cities limited assumption of existing bonded indebtedness of one city by another city to indebtedness for municipal improvements, including bonds in consolidation election which had not been issued for municipal improvement *held* to invalidate proceeding only as to such single bond issue (Gen. Laws 1931, Act 5166, §§ 2, 5, 7; Act 5229).

◆

Appeal from Superior Court, Los Angeles County; Allen B. Campbell, Judge.

Quo warranto proceeding by the People, on the relation of John Stevens McGroarty, against the City of Los Angeles. From an adverse judgment, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Biby & Biby and John E. Biby, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondent.

GOULD, Justice pro tem.

This is an inquiry by quo warranto, as of the date of judgment herein, as to the legal corporate status of the territory embraced within the limits of the city of Tujunga, Los Angeles county. It is claimed by plaintiff that, notwithstanding there were proceedings looking toward the consolidation of the city of Tujunga with the city of Los Angeles, including an election for that purpose held January 5, 1932, and notwithstanding the two cities are now being governed and ever since early in the year 1932 have been governed as one consolidated city, said proceedings are so defective that they were and are void and should be judicially so declared.

[1] The Consolidation Act (St. 1913, p. 577, as amended, Deering's Gen. Laws, 1931, Act 5166, p. 2593) provides that contiguous cities may consolidate and proceedings may be initiated by the filing of a petition with the council of the city with the lesser population, such petition to be signed by "not less than one-fourth in number of the qualified electors * * * as shown by the registration of electors" (section 2) of the city of the lesser population. Upon such a petition being so filed, the council "must, without delay, call a special election." It may be said that there are several jurisdictional facts in such a proceeding. In the first place, there must be the two cities—in this case the cities of Tujunga and Los Angeles; they must be contiguous; inasmuch as the petition must be presented to the city having the lesser population, the fact as to relative population must be established; the petition must be signed by a certain proportional number of the total number of electors as shown in a certain manner. The jurisdiction of the council to act is premised upon these required conditions of fact.

[2] In point (1) of appellant's brief herein it is claimed that one of these essentials is lacking in proof, that is, territorial contiguity. But cities are incorporated through public legislative acts, and their boundaries are in the acts delineated. Such acts are recognized by judicial bodies without proof, and the case of Gardner v. City Council of Tujunga, 140 Cal. App. 351, 35 P.(2d) 562, holds that the city council of Tujunga was permitted to take judicial notice of the boundary lines of that city and the city of Los Angeles, and hence of their contiguity. See, also, Rich v. McClure, 78 Cal. App. 209, 248 P. 275, and People v. City of Whittier, 133 Cal. App. 316, 24 P.(2d) 219.

[3] Appellant calls our attention to the fact that section 5 of the Consolidation Act, as amended by St. 1917, p. 30 (Gen. Laws 1931, Act 5166, § 5), permits the assumption of existing bonded indebtedness of one city by the other by a proper recital in the petition. Such assumption is limited

by the act to indebtedness already incurred or authorized for the acquisition, construction, or completion of any municipal improvement or improvements. The petition filed in this proceeding lists a number of such and plaintiff claims that this, too, is jurisdictional and that the status and purpose of such bonds must be supported by proof. We think not. We have tried to show that the only matters heretofore stated as such are jurisdictional because the act says that "whenever" the petition has been filed relating to two actually existing municipal corporations the election must be called. The assumption of debts is incidental. If they exist and are within the statute, they are assumed; if not, no liability under them is assumed. This phase, although an important one, is nevertheless not requisite to the action of the council in calling an election for, or to the consolidation itself.

[4] Appellant as to this position relies greatly upon Miller & Lux v. Board of Supervisors, 189 Cal. 254, 208 P. 304, a proceeding in certiorari, but the opinion in that case merely holds, as do many others, that facts essential for official action must be supported by evidence or proof. Notwithstanding the assertion in the cited case that "the allegations of the petition" must be proved, it is apparent from the context that these words refer only to such essential facts as the board or tribunal must find true before it acquires the right to act at all. In certiorari, the reviewing court merely inspects the procedure and never acts as an appellate tribunal as to the truth of the lower court's findings. In quo warranto, the jurisdiction, together with the truth of requisite facts, may be put in issue. In the instant case contiguity of territory was essential to legal consolidation of the two cities. If the proof, which herein was at least judicial notice, led to an erroneous conclusion thereon, quo warranto will void the consolidation. On the other hand, if one of the bond issues of one city was improperly stated in the petition, any attempt to levy taxes in the territory of the other city for payment thereof would be open to legal attack, but such fact would not affect the legal status under the consolidation proceedings.

[5] The true principle to guide the court in a consideration of the acts of an official body such as those under consideration here is stated by the Supreme Court in Wolfskill v. City Council of Los Angeles, 178 Cal. 610, at page 614, 174 P. 45, 47, as follows: "We are of the opinion that the trend of both recent legislation and decision has been toward a relaxation of this rigid rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions, with a view to upholding the action of such bodies, which, though informal in some respect, is taken with a view to advancing the public interest and welfare of the community within the limited range of their jurisdiction."

These principles dispose of the claim that jurisdiction was not acquired herein because no evidence was taken on the point of contiguity of the two cities, and also dispose of appellant's claim that the consolidation proceedings must be declared void because no evidence was taken upon that part of the petition which referred to bond issues. They likewise dispose of the claim that since one of the bond issues in the list was illegally there the proceedings are void.

It should be remembered that there is no claim in this proceeding that the two cities were not contiguous nor that the bond issues concerned were not correctly described. It is, however, claimed that one of such mentioned bond indebtednesses of the city of Los Angeles was not "for the acquisition, construction or completion of any municipal improvement or improvements," and this seems to be conceded.

[6, 7] The next point to which our attention is directed by appellant is that the certificate of the consolidation election of the city of Tujunga is fatally defective in that it merely mentions that the consolidation proposition carried, and not that indebtedness was assumed. Counsel is in error, as the proposition of consolidation and the assumption of indebtedness was one indivisible proposition upon which the vote was taken. People v. City of Los Angeles, 187 Cal. 56, 200 P. 947. The resolution declaring the result of the election, taken as a whole, with the minutes and acts of the city council of Tujunga to which such resolution refers, constitutes a full compliance with the statutory requirement, to wit, that the legislative body declare the result of the election, and that it cause a record of such declaration to be made. No set form is prescribed, and the courts will not intervene for technical or trivial reasons to set aside the will of the people as expressed at

an election. If the city clerk failed to enter the proceedings in full upon the minute book, this at most is a failure to perform a ministerial act, and cannot be urged as a reason for invalidating the entire proceedings.

Pursuing this point, appellant contends that the error complained of was carried into the record sent to the secretary of state, and that for that reason also the consolidation was never completed. Of course, if we are right in our analysis and conclusion above it would cover both contentions.

Upon this point it is forcefully urged by respondent that inasmuch as appellant has chosen to set out his complaint in full in the quo warranto proceeding, he is limited to the allegations therein contained, and that since he has not raised the point of insufficiency of the certificate in his complaint, he cannot raise it here. People v. City of Los Angeles, 133 Cal. 338, 65 P. 749. We look with favor upon this reasoning, but prefer, nevertheless, to cover the point from the viewpoint of merit.

[8] The next point of attack as to the legality of the consolidation of the two cities, to wit, that the city of Los Angeles improperly attached the emergency clause to its resolution confirming consolidation, falls within our view of the last proposition treated. It is appellant's contention that inasmuch as the resolution forwarded to the secretary of state is fatally defective for the reason above set out, and inasmuch as the emergency clause was improperly attached as stated, the resolutions of the councils of both cities reached the secretary of state before they were effective, and therefore are nullities. But if, as we have determined, the resolutions were in form correct, they were in the secretary of state's office thirty days after the enactment of the ordinance to which the emergency clause was attached, and the error would have been cured, if error it was.

We next approach the contention on behalf of appellant that the election in Tujunga was conducted at the polls under one inspector, one judge, and two clerks, instead of one inspector and two judges, as provided by the Consolidation Act. No provision is contained in said act as to clerks. It would, of course, be quite impossible to produce any sort of plausible argument that any effect upon the results of the election (the results being the real intent of the law instead of the fetish of strict adherence to form) was produced because of the fact that instead of two judges, one judge and two clerks were on the election board. None is claimed. The law itself but indefinitely defines the duties of the several members of the election board, and there was present one person for each of these separate duties. In addition, there were two clerks. To hold that the election would be entirely voided because the board was furnished clerical help seems too unreasonable to entertain. To contend that the one judge provided could not have performed all of the judicial duties of a board of election would be to argue in the face of known fact and in the face of the statute providing for all elections held in fifth and sixth class cities and requiring but one inspector, one judge, and two clerks. Act 5229, Deering's Gen. Laws, 1931, p. 2730. Respondent contends that since this last act was enacted later than the Consolidation Act it controls, and this evidently was the opinion of the legal departments of the two consolidating cities. But however that may be, we shall continue to treat the question as though the Consolidation Act controls even in this particular.

[9-10] There is no dissent in either brief to the wholesome doctrine that election laws are to be liberally construed to the end that when an election has been held the expressed will of the electors thereat will not be vitiated by any court because of any error committed in the course of the election, so long as the error complained of is not one which was likely to change the result of an election or one actually affecting the result of such election. In avoidance of this, appellant relies upon the provision in section 7 of the Consolidation Act, as amended by St. 1915, p. 312 (Gen. Laws 1931, Act 5166, § 7), as follows: "In the event any election authorized by this act is not called or held in the manner or within the time specified in this act, all proceedings relating to such consolidation shall be and become null and void." This provision was not in the original act and is incorporated in section 7 thereof directly after appropriate provisions to prevent cross-attempts, and legal entanglements resulting therefrom, to consolidate one city with other cities. It seems rather clear that this penalty was never meant to apply to an inconsequential variance in the actual election. Nowhere else in the California statutes is such an intention manifest, and the general rule is as heretofore stated.

[11] We thoroughly agree with appellants in their approval of the rule stated in Re Cramer's Election Case, 248 Pa. 208, 93 A. 937, 940, Ann. Cas. 1916E, 914, as follows: "It is an established rule of construction that where a legislative provision is accompanied with a penalty for failure to observe it, the provision is mandatory." It is true that the Consolidation Act, above referred to, has such a provision. But the rule itself is not absolute to the least variation. In construing such a rule in Taylor v. Bleakley, 55 Kan. 1, 39 P. 1045, 1048, 28 L. R. A. 683, 686, 49 Am. St. Rep. 233, the court says: "If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not; for such a statute is mandatory, and the court cannot enter into the question of its policy. In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood." It will be noticed the case speaks of an omission to follow the statute in its requirement as to the method in which the elector shall express himself, a primary requirement. There was no such omission in the instant proceeding. It also speaks of the requirement that was omitted as not being unreasonable. We see that the rule of reason in construction is used even where the penalty is provided.

The rule is expressed thus by our own Supreme Court in People v. City of Los Angeles, supra, 133 Cal. 338, page 344, 65 P. 749, 751: "As to which of these conflicting provisions should have been followed even a city council might err. Nor do I think it necessary to decide that question. These provisions have been stated mainly in illustration of the conclusion that as to the formation of voting precincts such provisions are directory merely, so that if it be conceded that the wrong statute was followed, or that neither was strictly followed, the election was not void. Such provisions are directory, not mandatory. It is not declared that a failure to observe the direction of the statute as to the number or size of the precincts shall invalidate the election. 'It is only those provisions of the statutes relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory. All others are directory merely, and a failure to observe them, caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of a precinct.'"

[12] We conclude that the variation from the statutory designation in the matter of personnel in the officers of the election board does not void the consolidation election.

[13, 14] Appellant's final contention has to do with the fact that certain bonds submitted to the electors of the city of Tujunga at the consolidation election were not incurred or authorized for any municipal improvement. Reference is had to the funding bonds of the city of Los Angeles incurred by that city for the settlement of damage claims arising out of the St. Francis dam disaster. As to this issue there can be no doubt that the act does not provide any method by which the city of Tujunga might assume to pay its share of these bonds. Even though the voters agreed to assume them, no tax can be lawfully levied concerning them. No decision has been cited wherein a consolidation or similar proceeding has been nullified because an attempt was made to include more than the law authorized. We prefer to adopt the reasoning indicated in State v. Town of Hessville, 191 Ind. 251, 131 N. E. 46, 132 N. E. 588, that an attempt to do more than the law authorizes does not result in invalidity of that which was authorized, but invalidates only that for which there was no statutory authority. So here, the inclusion of a bond issue for which the statute makes no provision results simply in the invalidity of the proceedings as to that single issue, leaving the authorized issues untainted by any stigma of illegality.

In spite of the irregularities and slight deviations from normal stressed by appellant in this proceeding, we feel that the courts should, where possible, give effect to the expressed will of the people as indicated at an election at which the issues were clearly presented to the electorate and where there was no possibility of serious misunderstanding as to the points involved.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 389

SUNSET FARMS, Inc., v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY.

Civ. 1928.

District Court of Appeal, Fourth District,
California.

Oct. 8, 1935.

Hearing Denied by Supreme Court
Dec. 5, 1935.

1. Prohibition ⇨3(5)

Appeal from order appointing receiver affords plain, speedy, and adequate remedy in ordinary course of law sufficiently adequate to prevent invocation of extraordinary remedy of prohibition although appeal from order would require more time than proceeding for prohibition (Code Civ. Proc. §§ 943, 1103).

2. Corporations ⇨557(3)

Receiver for corporation should be appointed upon ex parte application only in cases of greatest emergency and where, without such appointment, irreparable injury would unquestionably result.

3. Corporations ⇨1

Court of equity on proper occasion will disregard legal fiction of separate corporate existence.

4. Corporations ⇨1

Before obligations of individuals can be recognized as those of corporation, corporation must be influenced and governed by such person, and such unity of interest and ownership must exist that individuality, or separateness of person and corporation, has ceased so that adherence to fiction of separate existence of corporation would sanction fraud or promote injustice.

5. Corporations ⇨684

Where, pursuant to plan, business of domestic corporation which had originally belonged to president was transferred to foreign corporation which carried on identical business in same place under control of president of domestic corporation, who, together with his family and personal attorney, owned all stock in foreign corporation, judgment creditor of president of corporations and of domestic corporation *held* entitled to disregard separate corporate identity of foreign corporation by proceeding for receivership of foreign corporation for collection of judgments.

6. Corporations ⇨1

Ownership of every share of stock in corporation by individual masquerading under legal fiction of separate corporate identity *held* not required to establish unity of interest and ownership to justify court in disregarding separate identity of corporation, where such separate identity was being used as instrumentality for perpetration of fraud.

7. Receivers ⇨8

Appointment of receiver rests largely in discretion of trial court, and will not be disturbed in absence of showing of abuse of discretion.

8. Corporations ⇨553(2)

Appointment of receiver for corporation for collection of judgments against president and against corporation from which business had been transferred *held* not abuse of discretion, as against contention that resort to remedy of receivership was unjustified because plaintiff in receivership action possessed other adequate remedies.

9. Corporations ⇨684

Order appointing receiver of foreign corporation and of all property and assets thereof wherever situated *held* not void for excess of jurisdiction, where all business of corporation was carried on in state and corporation had been organized for purpose of obstructing judgment creditor of person by whom corporation was organized and controlled and of corporation from which business had been transferred from enforcing judgments.

10. Corporations ⇨557(2)

Complaint *held* sufficient to support order appointing receiver of corporation and of all property and assets of whatever kind and description and wherever situated.

> Complaint alleged that by reason of fraud receiver for corporation should be appointed to take possession of property thereinbefore described and of all other property of corporation, and prayed for appointment of receiver to take over property of corporation pending termination of action.

11. Prohibition ⇨3(1)

If order appointing receiver of corporation and its property was unduly extensive, corporation had adequate and speedy remedy through application for modification of order precluding relief by writ of prohibition against enforcement of order appointing receiver (Code Civ. Proc. § 1103).

◆

Original proceeding by the Sunset Farms, Incorporated, for writ of prohibition against the Superior Court of the State of California in and for the County of Imperial, V. N. Thompson, Judge.

Writ denied, and order to show cause discharged.

Lawler & Degnan, Rush & Beirne, and Mathes & Sheppard (by W. C. Mathes), all of Los Angeles, for petitioner.

Louis Ferrari, of San Francisco, Edmund Nelson, of Los Angeles, Hickcox & Trude, of El Centro, Clarke & Bowker and A. S. Goldflam, all of Los Angeles, and Cullinan, Hickey & Sweigert, Cushing & Cushing and E. S. Layman, all of San Francisco, for respondent.

JENNINGS, Justice.

The petitioner has applied for the issuance of a writ of prohibition to prohibit the taking of any further proceedings under an order appointing a receiver on the ground that the order of appointment is void for lack of jurisdiction.

The action in which the receiver was appointed was instituted in the superior court of Imperial county by H. W. Everts on June 3, 1935. Petitioner was named as a defendant therein. The complaint in said action, in addition to other relief, sought the appointment of a receiver for the property of petitioner pending the trial of the action. On the same date on which the action was commenced the plaintiff therein, without notice to petitioner, applied to the respondent court for the appointment of a receiver and an ex parte order appointing a receiver was thereupon made. The receiver named in the order qualified immediately following the entry of the order and on the aforementioned date ousted petitioner's officers and directors and seized and took possession of all property and assets of petitioner located in Imperial county and its corporate records and books and assumed control and management of the entire business and affairs of petitioner. Thereafter, petitioner moved the respondent court to vacate the order appointing the receiver. This motion was presented on June 10, 1935, and was denied on said date. The application for a writ of prohibition was filed in the Supreme Court on June 28, 1935. On July 1, 1935, the Supreme Court made an order commanding respondent to show cause on July 15, 1935, why the writ of prohibition should not issue as prayed and at the same time transferred the matter to this court for determination.

The respondent has demurred to the petition and has also filed its answer thereto.

[1] The principal contention advanced by respondent in support of the demurrer is that the petition is fatally defective in that it fails to disclose the absence of a plain, speedy, and adequate remedy available to petitioner in the ordinary course of law. The statute which authorizes the issuance of the writ provides that it may issue "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Section 1103, Code Civ. Proc. Respondent urges that petitioner possessed the right of immediate appeal from the order which it now seeks to prohibit and that this remedy was plain, speedy, and adequate. The advancement of this contention necessitates a consideration of those allegations of the petition whereby petitioner seeks to deny that there is available to it any plain, speedy, or adequate remedy in the ordinary course of law.

These allegations are lengthy and are set forth with very considerable detail. The reasons why an appeal from the order or from any judgment that may be rendered after trial of the action would be inadequate are seven in number and comprise approximately 10 pages of the printed petition. An examination of them discloses that they are predicated on the hypothesis that the receivership must necessarily be continued in effect pending an appeal from the order. This basic assumption is incorrect. Section 943 of the Code of Civil Procedure expressly authorizes a stay of the execution of an order appointing a receiver on an appeal therefrom through the medium of an undertaking executed for the purpose by the party perfecting the appeal. It was declared in Jacobs v. Superior Court, 133 Cal. 364, 365, 65 P. 826, 827, 85 Am. St. Rep. 204:

"Formerly—and when Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, was decided —there was no appeal from an order appointing a receiver, but in 1897 (St. 1897, p. 55) section 939 of the Code of Civil Procedure was amended so as to allow such appeal; and at the same time section 943 was amended so as to provide for the staying of an order appointing a receiver by an undertaking on appeal. These amendments were apparently intended to afford a remedy for prodigal, unwise, and unwarranted appointments of receivers (which seems to be a growing evil); and we think that they do afford an adequate remedy, as contemplated by section 1103 and the decisions of this court on the subject. The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal. See Agassiz v. Superior Court, supra [90 Cal. 101, 27 P. 49].

"The filing of the undertaking operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores the same to the appealing party from whom it had been taken."

The decision in Jacobs v. Superior Court, supra, is peculiarly in point because, like the present, it was an original application addressed to the Supreme Court for a writ of prohibition to arrest all further proceedings upon an order of the respondent superior court appointing a receiver. There is a further similarity in that the order sought to be annulled authorized the receiver to take possession of farming land with the crops growing thereon in an action to foreclose a mortgage on said land. The petitioners for the writ there maintained that they were the owners of the growing crops and that the plaintiff in the foreclosure suit being merely a mortgagee of the naked land had no legal right to interfere, by receivership or otherwise, with their possession and control of the crops. The respondents contended that the lease under which petitioners set up their claim was without consideration and was executed merely to delay creditors. The Supreme Court declined to examine the conflicting claims of the parties in the action in which the receiver was appointed or to determine whether or not the appointment was proper on the ground that an appeal from the order of appointment afforded a plain, speedy, and adequate remedy in the ordinary course of law within the meaning of section 1103 of the Code of Civil Procedure. That an appeal from an order appointing a receiver affords a remedy in the ordinary course of law sufficiently adequate to estop invocation of the extraordinary remedy of prohibition is upheld in the following decisions: Johnston v. Superior Court, 4 Cal. App. 90, 87 P. 211; Hubbard v. Justice's Court, 5 Cal. App. 90, 89 P. 865; California, etc., Ass'n v. Superior Court, 8 Cal. App. 711, 97 P. 769; Lightner Mining Co. v. Superior Court, 14 Cal. App. 642, 112 P. 909; Campbell v. Superior Court, 67 Cal. App. 728, 228 P. 354; Greenburg v. Superior Court, 71 Cal. App. 332, 235 P. 92; Pacific Broadcasting Co. v. Superior Court, 100 Cal. App. 649, 280 P. 991; Highland Securities Co. v. Superior Court, 119 Cal. App. 107, 6 P.(2d) 116.

The petition here alleges that the remedy of appeal from the order will be inadequate because a period of approximately two years would be required for the determination of such an appeal. It may be conceded that the determination of an appeal from the order would require the consumption of more time than is required by this proceeding. The time element does not, however, determine the inadequacy of the ordinary remedy. "A remedy does not fail to be speedy and adequate because, by pursuing it through the 'ordinary course of law,' more time would probably be consumed than in the proceeding here sought to be used." Agassiz v. Superior Court, 90 Cal. 101, 103, 27 P. 49, 50; Lightner Mining Co. v. Superior Court, supra.

It was suggested in Jacobs v. Superior Court, supra, that there might be exceptional facts which would call for a writ of prohibition notwithstanding the existence of the ordinary remedy afforded by appeal from the order of appointment. Petitioner maintains that its application shows that such facts are here present and that this is therefore a proper case for the issuance of the writ.

The petition alleges that petitioner is a Nevada corporation authorized to transact business in California and engaged in the transaction of such business with offices in El Centro, Cal.; that petitioner's principal business is the raising and marketing of cantaloupes, lettuce, asparagus, alfalfa, barley, and other crops grown on lands in Imperial county which it has leased from various persons; that at all times since its organization petitioner has had issued and outstanding 11,884 shares of preferred stock having a par value of $10 per share and 2,100 shares of common stock having no par value; that 1,100 shares of the common stock was originally issued to Clarence M. Bjerke on payment by him to petitioner of the sum of $1,100 and 1,000 shares of common stock was issued to Jud R. Rush on payment of the sum of $1,000; that 3,000 shares of preferred stock was issued to Hazel F. Bjerke, and 3,000 shares of such stock was issued to Will S. Fawcett for all of which petitioner received conveyances of two parcels of citrus bearing land one of which is located in Los Angeles county and the other in Orange county; that 5,884 shares of preferred stock was issued to Will S. Fawcett Company in return for which petitioner received certain personal property and leases from said Fawcett Company; that at all times since the original issuance of petitioner's capital stock, it has continued in the ownership and possession of the parties to whom it was originally issued except that on November 28, 1933, H. W. Everts acquired from the Will S. Fawcett Company at execution sale the above-mentioned 5,884 shares of preferred stock owned by that company and is now the owner and holder of such stock. The remaining allegations of the petition describe the institution of the action in which the receiver was appointed, the fact that the receiver was appointed ex parte without notice to petitioner, and the unsuccessful effort of petitioner to have the order of appointment vacated. These allegations also contain a declaration that the respondent court in making the order here attacked exceeded its jurisdiction and that the order and all acts performed pursuant to it are void for certain specified reasons. There is also, as has heretofore been noted, a denial that petitioner possesses any plain, speedy, or adequate remedy in the ordinary course of law; it being specifically alleged that the remedy of appeal either from the order or from any judgment which may be rendered will be wholly inadequate for various reasons.

Since it is apparent that the order appointing the receiver was based entirely on the verified complaint in the action of Everts v. Sunset Farms, a Corporation, et al., this pleading may properly be examined for the purpose of determining whether or not the respondent court exceeded its jurisdiction in making the order which is here sought to be annulled.

It is therein alleged that Sunset Farms, Inc., is a corporation which was organized and incorporated in the state of Nevada on September 3, 1932, and thereafter on September 7, 1932, duly qualified itself to transact business in California; that the defendant Will S. Fawcett is a director of said corporation; that for many years prior to September 3, 1932, Fawcett had engaged in extensive farming operations in California; that in the year 1926 Fawcett caused to be incorporated in California a corporation under the name of Will S. Fawcett Company, of which he became the president and general manager and that he continued to be and now is its president; that Fawcett, at all times after the incorporation of the Fawcett Company until September, 1932, owned at least 85 per cent. of the issued and outstanding capital stock of said corporation and that the remainder of the stock was owned by members of Fawcett's family and by employees of the corporation with the exception of one share; that on September 3, 1932, the Fawcett Company was indebted to the Bank of America National Trust & Savings Association in the sum of $175,000 with interest thereon by reason of certain promissory notes executed by the company in favor of the bank; that on October 4, 1932, the bank assigned the notes to the plaintiff; that on October 5, 1932, the plaintiff commenced an action to enforce collection of the notes against the Fawcett Company and recovered judgment in the amount of $200,700.52 on May 31, 1933; that on August 22, 1933, a writ of execution which had issued on said judgment was returned showing the payment thereon of the sum of $67,910.98 and an unpaid balance of $135,129.42 which was unsatisfied; that subsequently alias executions were issued on the judgment which produced payments on the judgment leaving an unpaid and unsatisfied balance of $135,116.23 on the date of the institution of the action; that on September 3, 1932, the defendant Will S. Fawcett was indebted to the above-mentioned bank in the sum of $390,000, being the principal amount of certain promissory notes executed by Fawcett whose payment was guaranteed by the Fawcett Company; that on October 4, 1932, the bank assigned these notes to the plaintiff, who commenced suit to enforce their collection on October 5, 1932, which suit resulted in the entry of a judgment in plaintiff's favor against Fawcett for $314,553.16 on January 23, 1934; that thereafter a writ of execution and alias writs were issued on said judgment and were returned and filed showing that the unpaid and unsatisfied amount of the judgment was $277,833.07; that on September 6, 1932, the Fawcett Company was the owner of certain described personal property consisting of farming tools and equipment, supplies and materials, and a trade-mark for fresh cantaloupes, lettuce, and grapes registered by Will S. Fawcett in the United States Patent Office and assigned by Fawcett to the Fawcett Company; that on the above-stated date the Fawcett Company also owned two parcels of real property in Imperial county, California, and on said date the said company transferred all of the described personal property to the Sunset Farms, Inc., and thereupon executed leases of the real property described in the complaint for a period of 20 years to the Sunset Farms, Inc.; that on September 6, 1932, Fawcett himself owned two parcels of land, one located in Los Angeles county and the other in Orange county, which he then conveyed to the Sunset Farms, Inc.; that the transfers of personal property and the conveyances of real property thus accomplished by Fawcett and the Fawcett Company were the result of a fraudulent scheme and conspiracy contrived and planned by Fawcett and the directors of the Fawcett Company whereby they proposed to divest Fawcett and the Fawcett Company of ownership of the described properties for the purpose of concealing the same and of preventing plaintiff from collecting the amounts represented by the aforementioned judgments, and in furtherance of said scheme and plan Fawcett and the directors of said Fawcett Company first caused the Sunset Farms, Inc., to be incorporated in the state of Nevada, in which state the owners of stock in corporations are free from personal liability; that they then assigned and conveyed the California property of Fawcett and the Fawcett Company to the Nevada corporation; that at the time of such transfers Fawcett and the Fawcett Company were insolvent and are now insolvent; that on September 3, 1932, Fawcett and the Fawcett Company vacated the premises and surrendered possession of the personal property to Sunset Farms, Inc.; that the various transfers and conveyances were and each thereof was fraudulently made without any consideration and as part of the plan for the consummation of the fraud sought to be perpetrated upon plaintiff; that Sunset Farms, Inc., was incorporated with three dummy directors who had no financial interest in said corporation; that in October, 1932, Fawcett, who is president of Fawcett Company, was elected president of Sunset Farms, Inc., and ever since the date of his election has acted in such capacity at a specified salary; that the vice president of Fawcett Company has at all times since October, 1932, been in the employ of Sunset Farms, Inc., as manager of its farming operations at a specified remuneration; that the leases of real property executed by Fawcett Company were so planned and executed that the lessee should be able to retain possession of the demised premises for a period of 20 years without any rent being paid to the owner; that plaintiff is the owner of the land formerly owned by Fawcett Company in Imperial county and the leases of said property executed by the Fawcett Company are unfair, unjust, and onerous, and were made as a part of the aforementioned plan for the purpose of fraudulently preventing plaintiff from securing any rentals or other returns from said real property; that at all times since October, 1932, the Sunset Farms, Inc., has maintained its offices in the same rooms in the same building where the business of Fawcett and Fawcett Company was and is being transacted and where the officers of said Fawcett Company had their quarters, and the Sunset Farms, Inc., has at all times since said date used the same equipment, paraphernalia, and warehouse facilities that were formerly used by Fawcett and Fawcett Company in carrying on their respective business; that plaintiff is informed and believes that Sunset Farms, Inc., has at all times since October, 1932, been using and is using the files and lists of customers of Fawcett and Fawcett Company and that Sunset Farms, Inc., has proceeded to transact business with the same dealers and brokers formerly employed by Fawcett and Fawcett Company and that the eastern connections of the Nevada corporation are substantially the same as those of Fawcett and Fawcett Company; that Sunset Farms, Inc., since October, 1932, has been carrying on and conducting the identical business formerly conducted by Fawcett and Fawcett Company and solely with their assets; that ever since the incorporation of the Nevada corporation it has conducted its business under the control, direction, and domination of Fawcett and in his private residence; that Fawcett is a director and president and general manager of Sunset Farms, Inc., and is in complete control of said Nevada corporation, the two other directors thereof being dummy directors who are not financially interested in said corporation; that Sunset Farms, Inc., is carrying on its farming operations on the same properties formerly owned by Fawcett and Fawcett Company and is using the same equipment, machinery, live stock, supplies, and trade-mark formerly owned by Fawcett Company and Fawcett; that Sunset Farms, Inc., is a fraudulent reorganization of Fawcett and Fawcett Company and is growing certain designated crops on the various lands formerly owned and leased by Fawcett and Fawcett Company; that by reason of the fraud and the above-described fraudulent scheme and conspiracy Sunset Farms, Inc., is harvesting and will harvest and market the crops which are being grown and will receive and conceal and sequester the proceeds therefrom so that plaintiff will be prevented from recovering the same to apply on his judgment against Fawcett and Fawcett Company; that because of the fraud and conspiracy a receiver should be appointed to take possession of all the described real property of Sunset Farms, Inc., and of the growing crops, and harvest and market the same and make an accounting to the court and to pay over to plaintiff the proceeds to apply on his judgments against Fawcett and Fawcett Company. The second cause of action of said complaint alleges that Fawcett and the Fawcett Company transferred the above-mentioned personal property and conveyed, leased, and incumbered the real property voluntarily and while they were insolvent and with the intent to hinder, delay, and defraud their creditors, especially the plaintiff, and that at all times subsequent to such transfers, conveyances, and leases, Fawcett and Fawcett Company have been and are now insolvent. The third cause of action alleges that Sunset Farms, Inc., by reason of the nonpayment of the judgments obtained against Fawcett and Fawcett Company, is indebted to plaintiff in the total amount represented by said judgments.

[2] In contending that the above-described allegations did not justify the respondent court in employing so drastic an instrumentality as a receivership, petitioner relies upon the established principle that a court of equity will not appoint a receiver of the property of a corporation in aid of an action prosecuted against a corporation by a private person whether such person be a stockholder in the corporation or merely a creditor. This rule was clearly announced in the French Bank Case, 53 Cal. 495, wherein it was pointed out that the power of a court of equity to appoint a receiver in such a case must be established by statute and that the only statute which could be relied upon as conferring such authority is the fifth subdivision of section 564 of the Code of Civil Procedure, which provides for the appointment of a receiver in a pending action "in the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights." It was, however, declared that the authority of the court to appoint a receiver necessarily presupposes that there is pending before the court an action instituted by some one authorized by law to commence it but that there is no statute which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation on the ground that it is insolvent or to obtain relief by seizing its property out of the hands of its constituted management and placing it in a receiver's hands. The general rule thus announced has been followed in a line of later decisions in California, among which may be noted the following: Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Fischer v. Superior Court, 110 Cal. 129, 42 P. 561; Elliott v. Superior Court, 168 Cal. 727, 145 P. 101; A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94, 89 P. 866; Moore v. Superior Court, 127 Cal. App. 692, 16 P.(2d) 324. The general rule which, in the final analysis, is based on the concern of the law for corporate business welfare, is not, however, so rigid as to permit of no exception. This was at least intimated in A. G. Col Co. v. Superior Court, supra, where, at page 613 of 196 Cal. 604, 238 P. 926, it is said that the appointment of a receiver for a corporation on an ex parte application is so dangerous an expedient that it should be done only in cases of the greatest emergency and where, without such appointment, irreparable injury will unquestionably result.

The respondent maintains that a case of this sort was here presented, and that consequently the order of appointment should not be annulled by this proceeding. Its contention in this regard is based on the premise that the verified complaint in the receivership action showed that the incorporation of petitioner was an integral part of the fraudulent plan concocted by Will S. Fawcett and the directors of the Will S. Fawcett Company to render impossible the collection of the judgments obtained against these parties by the plaintiff in said receivership action, and that petitioner's corporate identity was simply a convenient mask assumed by Fawcett and the directors of the California corporation to assist them in the perpetration of their fraudulent scheme. The essential element of this contention is that the facts set out in the complaint in the receivership action demonstrate that petitioner is the alter ego of Will S. Fawcett.

[3, 4] It is no new doctrine that a court of equity will on a proper occasion disregard the legal fiction of separate corporate existence. It was done, for example, in the following cases: Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Meizlisch v. San Francisco Wool, etc., Co., 213 Cal. 668, 3 P.(2d) 310; Patents Process, Inc., v. Superior Court, 101 Cal. App. 541, 282 P. 21; Mirabito v. San Francisco Dairy Co. (Cal. App.) 47 P.(2d) 530. In

Minifie v. Rowley, supra, 187 Cal. 481, at page 487, 202 P. 673, 676, it is declared that: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

[5, 6] In its contention that respondent was not justified in disregarding the separate corporate existence of itself, petitioner stresses the necessity of a showing of unity of interest and ownership and maintains that it has not been made to appear that there is such unity that the separateness of itself and Will S. Fawcett and the Fawcett Company has ceased. As heretofore noted, the verified complaint in the receivership action alleges that Fawcett and the directors of the California corporation, Fawcett Company, contrived and planned a fraudulent scheme for the purpose of preventing the plaintiff in said action from collecting the judgments which he had obtained against Fawcett and the Fawcett Company and to further this scheme they first caused petitioner to be incorporated in Nevada with three dummy directors who had no financial interest in the corporation and, both Fawcett and the Fawcett Company being then insolvent, they next transferred and conveyed various real and personal property and assets in California without receiving any consideration therefor to petitioner and surrendered possession of such property and assets to petitioner and that Fawcett, who is the president of Fawcett Company, became president of petitioner shortly after the incorporation of petitioner. It is then alleged that petitioner at all times since October, 1932, has maintained its offices in the same rooms in the same building wherein the offices and business of Fawcett and Fawcett Company are located; that petitioner since said date has used the same equipment, warehouse facilities, paraphernalia, and other property theretofore used by Fawcett and Fawcett Company in the transaction of their respective business, and on information and belief it is alleged that since said date petitioner has used the files and lists of customers of Fawcett and Fawcett Company and has carried on its business through the same dealers and with substantially the same eastern connections as those of Fawcett and Fawcett Company. It is further alleged that petitioner is conducting the identical business formerly conducted by Fawcett and Fawcett Company; that ever since the incorporation of petitioner it has carried on its business in Fawcett's private residence under his control and domination; and that Fawcett, who is director, president, and manager of petitioner, has complete control of petitioner, there being only two other directors who are mere dummies without any financial interest in the corporation. It is finally alleged that petitioner is a fraudulent reorganization of Fawcett and Fawcett Company.

We think the above-described allegations amply justified the respondent in disregarding petitioner's separate corporate identity. Stanford Hotel Co. v. M. Schwind Co., supra; Meizlisch v. San Francisco Wool, etc., Co., supra.

In its insistent contention upon strict adherence to the doctrine of unity of interest and ownership announced in Minifie v. Rowley, supra, petitioner points to the allegations of its petition wherein it is stated that at all times since its incorporation petitioner has had issued and outstanding 11,884 shares of preferred and 2,100 shares of common stock; that 1,100 shares of the latter were issued to Clarence M. Bjerke and 1,000 shares to Jud R. Rush; and that 3,000 shares of the former stock were issued to Hazel F. Bjerke, 3,000 shares to Fawcett, and 5,884 shares to the Fawcett Company—all of said stock being issued upon the payment to petitioner of designated consideration. These allegations, it is declared, effectually negative the existence of unity of ownership between Fawcett and Fawcett Company and petitioner since it is thus shown that all of the common stock of petitioner is owned by strangers and 300 shares, more than one-fourth of the preferred, is owned by someone other than Fawcett or the Fawcett Company. However, so far as this proceeding is concerned, we are not limited to the allegations of the petition. Respondent has answered the petition and by this pleading it appears that Hazel F. Bjerke is the daughter of Will S. Fawcett, Clarence M. Bjerke is Fawcett's son-in-law, and Jud R. Rush is now and for many years has been Fawcett's personal attorney and that he has never attended a stockholders' meeting of petitioner, but has at all times appointed Clarence M. Bjerke his proxy and attorney in fact to represent him at such stockholders' meetings. It is also alleged that Will S. Fawcett has been the sole stockholder of Will S. Fawcett Company except for a negligible number of shares issued to members of his family and trusted employees of Fawcett, and that at all times since its incorporation the company has been the alter ego of Fawcett. These allegations indicate that, notwithstanding the ownership of a considerable quantity of petitioner's stock by apparent strangers, these owners were by no means independent stock owners but, on the contrary, are members of Fawcett's family or, in the case of Jud R. Rush, Fawcett's personal attorney. Other allegations of the answer demonstrate that petitioner was controlled and dominated by Will S. Fawcett. We do not understand that by "Unity of Interest and Ownership" it is meant that every share of stock in the corporation must be owned by the individual who is masquerading under the legal fiction of separate corporate identity in order to justify a court of equity in stripping away the mask particularly when it appears that the mask is being used as a convenient instrumentality for the perpetration of fraud. It was not so decided in Meizlisch v. San Francisco Wool, etc., Co., supra, where it appeared that the principal stockholder of the corporation was the daughter of the man who attempted to hide behind the mask of separate corporate identity. It was not so held in Minifie v. Rowley, supra, for it was there shown that not all of the stock of the corporation was owned by the individual who relied on the separate identity of the corporation to protect him in an action brought to recover payment of a promissory note.

It is therefore our conclusion that petitioner's above-mentioned contention is not sustainable.

[7, 8] Petitioner further contends that the appointment of the receiver was clearly erroneous for the reason that the plaintiff in the receivership action possessed other remedies which would have afforded ample protection and that therefore resort to the drastic remedy of receivership was not justified. It is suggested, for example, that the remedy of lis pendens was entirely adequate. With this we cannot agree. The recordation of a notice of lis pendens might have protected the plaintiff against an actual transfer of the real property. It would certainly not have prevented petitioner and the other defendants in the receivership action from removing the proceeds of petitioner's business from the jurisdiction of the respondent court. It is also suggested that an injunction would have sufficiently protected plaintiff and that the expense and annoyance of a receivership could have been thus avoided. The rule is established that the appointment of a receiver rests largely in the discretion of the trial court and that its action in appointing a receiver or its refusal of an application for the appointment of such an officer will not be disturbed in the absence of a showing that the court's discretion has been abused. Bank of Woodland v. Heron, 120 Cal. 614, 52 P. 1006; Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, 71 Am. St. Rep. 17; Davies v. Ramsdell, 40 Cal. App. 432, 183 P. 702; Fox v. Flood, 44 Cal. App. 786, 187 P. 68; Brush v. Apartment & Hotel Financing Corporation, 82 Cal. App. 723, 256 P. 285. The facts and circumstances which are disclosed by the petition and respondent's answer thereto do not, in our opinion, indicate such abuse of discretion that we find ourselves impelled to disturb the trial court's order on the ground suggested.

[9, 10] It is further urged that the scope of the order of appointment is so far in excess of that which was demanded in the complaint that the jurisdiction of respondent was manifestly exceeded by the making of the order which is therefore void and should be annulled by this proceeding. In this connection, it is pointed out that the complaint in the receivership action prayed merely for the appointment of a receiver who should take possession of the real and personal property of petitioner described in the pleading, whereas the order that was made and which is here attacked appointed a receiver of the petitioner corporation and of all the property and assets of petitioner of whatever kind and description and wherever situated.

The broad provisions of the order leave no doubt that the receiver therein named was appointed for petitioner and was authorized and directed to take possession of all the property and assets of petitioner and to manage and control the entire business theretofore conducted by petitioner. The expansiveness of its scope would therefore appear to render it vulnerable to attack on the basis of the general rule heretofore mentioned, viz., that a receiver may not be appointed in a suit by a creditor to take over the entire business of a corporation and thus to usurp the functions of its regularly constituted officers and directors. However, if it sufficiently appears that the corporation is merely the alter ego of an individual and that the separate identity of corporate entity was fabricated and assumed for the purpose of perpetrating a fraud, a court of equity is justified in disregarding the corporate fiction in order to reach the individual and fasten upon him liability for his fraudulent action.

In this proceeding, although the apparent scope of the order is so broad as to indicate excess of jurisdiction, the facts and circumstances justify respondent's action in appointing a receiver for petitioner's entire business. So far as appears this business was carried on exclusively in the state of California under the domination and control and active management of Will S. Fawcett. Petitioner carried on no business in the state of Nevada. It was evidently organized for the express purpose of taking over the business which had theretofore been conducted by Fawcett and the Fawcett Company which he owned and controlled. It was therefore in effect a reorganization of Fawcett and Fawcett Company and the convenient instrumentality of separate corporate identity was employed for the purpose of preventing or at least hampering and obstructing a judgment creditor of Fawcett and Fawcett Company in his efforts to enforce collection of the large indebtedness specified in the judgments.

The objection that the scope of the order exceeds the prayer of the complaint is not literally sustained by the terms of the pleading. While it is true, as contended by petitioner, that it is alleged "that by reason of the fraud and conspiracy as herein alleged a receiver should be appointed to take possession of all the real and personal property hereinbefore described" which would apparently limit the plaintiff's request to the appointment of a receiver for specifically described property, the allegation does not stop there but continues as follows: "and other properties of Sunset Farms, Inc." Furthermore, the prayer of the complaint, so far as receivership is concerned, is: "That a receiver be appointed to take over the property of the defendant, Sunset Farms, Inc., pending the termination of this action." The order that was made was in compliance with the prayer.

[11] Finally, even if it be assumed that the order was unduly extensive, petitioner has available a convenient, adequate, and speedy remedy through the medium of an application addressed to respondent for the modification of the order.

For the reasons herein stated, the order to show cause is discharged and the writ of prohibition is denied.

We concur: BARNARD, P. J.; MARKS, J.

9 Cal.App.2d 480

In re McCOIN'S ESTATE.

McCOIN v. WINEINGER et al.

Civ. 10382.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1935.

Hearing Denied by Supreme Court Dec. 12, 1935.

1. Husband and wife ⚷266

Written agreement between husband and wife giving each joint ownership in money deposited from community funds, and providing for payment of deposit to either or to survivor, *held* to convert community ownership in money deposited into joint ownership.

2. Husband and wife ⚷273(1)

Husband's withdrawal of money which had been deposited from community funds under agreement that husband and wife should be joint owners thereof *held* not termination of wife's interest therein in absence of agreement; and hence, upon death of wife, entire ownership of money was vested in husband as surviving owner, and not surviving member of community, entitling sole heir of husband to entire sum after husband's death.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings in the matter of the estate of John M. McCoin, also known as J. M. McCoin and J. M. McCain, deceased, between John B. McCoin and W. B. Wineinger and others. From a decree of distribution, John B. McCoin appeals.

Reversed, with directions.

Hugh A. White, of Holdenville, Okl., and Kaye & Johnstone, of Los Angeles, for appellant.

James E. Fenton, of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an appeal from a decree in probate, distributing the sum of $1,091.30 to appellant, father of decedent, and an equal amount to respondents, heirs of Lula Mae Wineinger McCoin, predeceased wife of decedent. All sums of money involved were acquired as community property of decedent and his wife Lula Mae McCoin. If, at the time of death of Lula Mae McCoin, the money was the property of the community, it was properly distributed by the decree appealed from. If, at that time, the property was held in joint tenancy by decedent and his wife or if it was the separate property of decedent, the whole thereof, and not the half, was distributable to appellant as sole heir of the decedent.

[1] The decedent John M. McCoin and Lula Mae McCoin married in May of 1920, and were husband and wife until the death of the wife on December 21, 1932. The court found upon facts that were stipulated and upon evidence that was introduced, as follows:

"That on the 5th day of January, 1926, the decedent John M. McCoin and his wife, Lula Mae McCoin deposited in the Farmers & Merchants Bank of Long Beach a joint account in the sum of $1,500, at which time they entered into an agreement in writing executed by them pertaining to the said account, in words and figures following:

"Authorized signature of Mr. and Mrs. J. M. McCoin In Account with Sav. Dept. Farmers and Merchants Bank of Long Beach. We, the undersigned, hereby agree to and give each to the other, a joint ownership in all moneys now on deposit or at any time hereafter deposited by us for us, or either of us, together with all accumulations thereon, in our account with the above-named bank, payable to either of us, or to the survivor, and authorize each the other to endorse and cash or deposit checks payable to either of us.

"We hereby agree to the rules governing the Savings Department of the Farmers and Merchants Bank of Long Beach, as to all deposits and withdrawals made on this account.

"Signature Mrs. J. M. McCoin
"Signature J. M. McCoin
"Date 193 Dept. $——"

The court further found that other sums deposited, which brought the total to $2,357.02, came from community funds and became separate property by reason of deposit in the joint account; that on December 20, 1932, the day before the death of his wife, J. M. McCoin withdrew said sum from the joint account and deposited the same in an account in his individual name; and that the same again became community property. The money distributed to the parties to this appeal consisted of the balance of $2,357.02, less expenses of administration. The court concluded, as a matter of law, that the funds so withdrawn from the joint account and deposited by decedent in his individual account were the property of the community at the time of the death of Mrs. McCoin.

That the effect of the agreement was to convert the community ownership into a joint ownership cannot be questioned. It has been so held in Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515; In re Estate of Harris, 169 Cal. 725, 147 P. 967, 968; In re Estate of Gurnsey, 177 Cal. 211, 170 P. 402; and Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003.

In Re Estate of Harris, supra, it was held that the withdrawal of funds in bank, jointly owned, and their investment in other property, taken in the husband's name, did not alter the joint ownership or divest the wife of her interest therein; the court saying, "property acquired with money taken from the bank account would retain the character of joint property, the same as the money with which it was obtained, unless by some agreement between the parties its character was changed." In the instant case there was no agreement between the husband and wife, nor does it appear that the wife even had knowledge of the withdrawal of the funds by her husband.

[2] Under the principles declared by the foregoing authorities, which are directly in point, it follows that the withdrawal of the money from the bank by J. M. McCoin did not have the effect of terminating the wife's interest therein, and that upon the

death of his wife title to the money became entire and absolute in the husband, as the surviving owner, but not as the surviving member of the community.

Therefore appellant, as the sole heir at law of J. M. McCoin, deceased, was entitled to have distributed to him the entire sum of $2,182.60.

The decree appealed from is reversed, and the trial court is directed to distribute to appellant John B. McCoin, subject to any further deductions in course of administration, the sum of $2,182.60.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 506

KILGORE v. SOUTHERN PACIFIC CO.

Civ. 1091.

District Court of Appeal, Fourth District, California.

Oct. 16, 1935.

Hearing Denied by Supreme Court Dec. 12, 1935.

1. Railroads 🔑324(1)

Railroad crossing is in itself warning of danger, and imposes upon automobile driver, knowingly approaching it, duty of observing due care for his own safety.

2. Railroads 🔑348(6)

In action by autoist for injuries sustained when his automobile collided with railroad freight car standing on spur track, evidence *held* to show that autoist who was familiar with railroad crossing was guilty of contributory negligence.

3. Appeal and error 🔑688(1)

Showing by transcript that defendant's counsel desired judge to visit scene of accident, that judge was willing to go, that there was stipulation of counsel for plaintiff that he might, and that plaintiff's counsel made statement that judge had seen place of accident *held* insufficient to show that judge went to place of accident and that conditions were same as those prevailing at time of accident as regards contention that trial judge's viewing premises should furnish evidence to support judgment for plaintiff.

◆

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by B. M. Kilgore against the Southern Pacific Company. From a judgment for the plaintiff, the defendant appeals.

Judgment reversed.

Hickcox, Trude & Robertson, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

MARKS, Justice.

Plaintiff brought this action to recover damages which he suffered when he drove his automobile into the side of a freight car standing on a switch across Walnut avenue in Holtville in Imperial county. The case was tried before the court without a jury, and judgment was awarded plaintiff in the sum of $1,035.50.

Walnut avenue runs north and south and is a public street in the city of Holtville. It has a 20-foot paved strip in its center. It is intersected at right angles by a main track, and three spur tracks, of defendant; two of the spur tracks being north of the main track. Plaintiff admitted having crossed these tracks from two to four times every day between October 1, 1931, and the date of the accident. The usual cross-arm warning signals were maintained by the defendant north and south of the tracks.

Northerly from a point about 30 feet north of the northerly spur track the roadway of Walnut avenue was practically level. In that 30 feet it ascended 15/100 of a foot. It then raised an additional 39/100 of a foot to a point near the north rail of the northerly spur track nearest to the main tracks. On the evening of January 15, 1932, a train crew of defendant switched to and left standing on the spur track last mentioned an automobile freight car 50 feet long and about 12 feet high, so that it entirely blocked the Walnut avenue crossing. Plaintiff drove his automobile into this freight car, causing the injuries for which the trial court gave him judgment.

Plaintiff testified that the sight of one of his eyes was good; that the brakes of his automobile were in good condition; that its headlights were good and lighted the roadway 100 feet in advance of the car; that the night in question was dark but clear and the roadway was dry; that at 8 o'clock p. m., on January 15, 1932, he was approaching the railroad crossing and was driving south on Walnut avenue at a speed of between 15 and 20 miles an hour; that when within about 40 feet of the railroad car he first saw it; that he moved to apply his brakes and commenced to do so when within about 30 feet from the car; that he could not stop his automobile in the intervening distance and crashed into the freight car. The car had not been on the crossing more than three minutes prior to the accident.

Plaintiff testified that no warning of the obstruction was given by any person. Defendant's witnesses testified that two of its employees stood in the roadway on the north side of the car and by hallooing and waving lighted lanterns attempted to halt plaintiff. The trial court evidently rejected the testimony of these witnesses, so we must accept plaintiff's version.

[1] Plaintiff admits that he was well acquainted with the conditions of the crossing in question. A railroad crossing is in itself a warning of danger and imposes on an automobile driver, knowingly approaching it, the duty of observing due care for his own safety. It constitutes one of those conditions which the Legislature had in mind when in subdivision (a) of section 113 of the California Vehicle Act, as amended by St. 1931, p. 2120 (in effect at the time of the accident) it provided that "any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[2] We think there can be but one conclusion drawn from plaintiff's testimony. He knew he was approaching a railroad crossing, a place of danger. This knowledge should have warned him and caused him to exercise an ordinarily diligent use of his senses. Had he done so, he would have seen the car across the road in time to have avoided running into it, as he testified that the headlights of his automobile illumined the roadway for 100 feet and the evidence is conclusive that the tracks upon which the car stood were only $6^{48}/_{100}$ inches higher than the roadway on which he was traveling. The knowledge that he was approaching a place of danger did not cause plaintiff to become watchful for the danger. When he was within 100 feet from the crossing, his lights shone that distance, and the crossing was illuminated by them. He could have seen the railroad car across his path had he looked. This he did not do. He proceeded on his way for about 60 feet unconscious of the danger which should have been apparent to him. When he saw the car, it was too late for him to stop, if his testimony is to be taken as true. The failure of plaintiff, when he knew that he was approaching a place of danger to himself, to use his faculties and take ordinary care for his own safety, amounted to contributory negligence on his part. The following cases support this conclusion: Philadelphia & R. R. Co. v. Dillon, 1 W. W. Harr. (31 Del.) 247, 114 A. 62, 15 A. L. R. 894; Weston v. Southern R. Co., 194 N. C. 210, 139 S. E. 237; Haarstrich v. Oregon Short Line R. Co., 70 Utah, 552, 262 P. 100; St. Louis-San Francisco R. Co. v. Guthrie, 216 Ala. 613, 114 So. 215, 56 A. L. R. 1110; Gilman v. Central Vermont R. Co., 93 Vt. 340, 107 A. 122, 16 A. L. R. 1102; Brown v. Southern R. Co. (C. C. A.) 61 F.(2d) 399; Gulf, M. & N. R. Co. v. Kennard, 164 Miss. 380, 145 So. 110, and Rowe v. Northern Pac. R. Co., 52 Idaho, 649, 17 P.(2d) 352.

[3] Counsel for plaintiff suggests that the trial judge went to the scene of the accident at night and viewed it and that this should furnish evidence to support the judgment. There are but two references to this in the transcript. The first is a statement by counsel for defendant that he would like to take the judge to the Walnut avenue crossing, and the expression of the willingness of the judge to go, with the stipulation of counsel for plaintiff that he might go. Just before the close of the trial counsel for plaintiff stated that the judge had seen the place of the accident. This is not sufficient to force the conclusion that the judge went to the place in question, or that, if he did go, conditions there were the same or similar to those prevailing at the time of the accident.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

9 Cal.App.2d 445

STEEN v. WHITTINGTON et al.

Civ. 10425.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1935.

1. Dead bodies ⚷**1**

In absence of statute, there is no property in dead body.

2. Limitation of actions ⚷**31**

Mother's action for mental and physical shock and illness arising from removal of body of deceased son from burial plot *held* barred where not commenced within one year from removal of body and from time mother obtained knowledge of its removal, as against contention that fraudulent removal of body and concealment of fact from plaintiff brought action within three-year statute of limitation relating to actions for fraud (Code Civ. Proc. § 340, subd. 3).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Stella M. Steen against W. J. Whittington, doing business under the name of Whittington Funeral Parlors, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Harry Alkow, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and E. H. Conley, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for respondent Inglewood Park Cemetery Ass'n.

Frank R. Carrell, of Los Angeles, for respondent W. J. Whittington.

WILSON, Justice pro tem.

This is an action to recover damages because of illness and nervous shock alleged to have been suffered by the appellant because of the removal of the body of her deceased son from the plot in which he was first buried to a point elsewhere in the cemetery. The complaint alleges that the body was removed on June 2, 1932, and that thereafter until March 21, 1933, appellant visited the original burial plot once or twice weekly and that on such occasions she purchased and placed expensive flowers upon the plot in which she believed the body of her son was buried. A demurrer to the complaint was sustained without leave to amend, and from the judgment following such ruling the plaintiff has appealed.

The complaint does not allege that the decedent left no surviving widow or father, or other relative who might assert a claim for damages for the same alleged wrongful act of the respondents. See Gostkowski v. Roman Catholic Church, etc., 262 N. Y. 320, 186 N. E. 798. Whether the complaint states a cause of action, in the absence of such an allegation, we do not decide, for the reason that if the appellant had a cause of action, it is barred by the statute of limitations.

[1, 2] The complaint was filed December 10, 1934, more than one year after the removal of the body and more than one year after appellant obtained knowledge of its removal. In the absence of statutory provisions, there is no property in a dead body. Enos v. Snyder, 131 Cal. 68, 63 P. 170, 82 Am. St. Rep. 330, 53 L. R. A. 221; Huntly v. Zurich, etc., Co., 100 Cal. App. 201, 280 P. 163. The removal of the body from its original burial place to another in itself would not have constituted a ground for the recovery of damages. The gravamen of the cause of action is the mental and physical shock to the appellant and the illness suffered by her upon her discovery of the fact that the body had been removed. Without such injury to her personally she would have had no cause of action. Her action was barred because it was not commenced within one year after the accrual of the cause of action. Code Civ. Proc. § 340, subd. 3; Huntly v. Zurich, etc., Co., supra.

By her allegations that the body was fraudulently removed and that, with knowledge of appellant's visitations, respondents wrongfully and fraudulently concealed the fact of removal from her, appellant seeks to place her cause of action within the three-year limitation for an action for fraud. The action is not one for relief on the ground of fraud, but is to recover damages for the personal injuries of appellant, consisting of physical and mental suffering, consequent upon the alleged wrongful act of the respondents. Such injury as the appellant endured would have resulted whether the acts of the respondents were fraudulent or otherwise.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

4 Cal.2d 456

LEVY v. DREW.

L. A. 15332.

Supreme Court of California.
Oct. 16, 1935.

1. **Judgment** ⚿401
Where judgment for plaintiff has been vacated by trial court, defendant is entitled to restitution of all things taken from him under judgment.

2. **Judgment** ⚿401
Judgment creditor had no right to retain money collected under execution after judgment on which execution was issued had been vacated, even though he had caused satisfaction of judgment to be entered after he had received money from sheriff, since there remained nothing to satisfy after judgment was vacated.

3. **Bankruptcy** ⚿154
In suit by bankruptcy trustee against judgment creditor who obtained money under execution on judgment which was subsequently vacated, judgment creditor *held* not entitled to offset his claim for services rendered to bankrupt, since money was not voluntarily paid to be applied on particular debt owed (Bankr. Act § 68, 11 USCA § 108).

4. **Judgment** ⚿401
As respects right of bankruptcy trustee to recover from judgment creditor money obtained under execution on judgment which was subsequently vacated, trust for money so obtained did not come into being until order setting aside judgment became final, after which time law imposed upon judgment creditor obligation of returning money to bankrupt, notwithstanding failure of bankruptcy trustee to identify trust res (Bankr. Act § 68 (a), 11 USCA § 108 (a).

5. **Trusts** ⚿231(1)
Trustee cannot be permitted to profit by his own wrong.

6. **Appeal and error** ⚿1208(1)
Money collected by judgment creditor under judgment which is subsequently reversed should be returned.

7. **Trusts** ⚿65
Where money is paid by bankrupt debtor to his creditor for specific purpose and is not used for that purpose, creditor becomes a trustee and holds money in trust.

8. **Bankruptcy** ⚿154
In suit by bankruptcy trustee against judgment creditor who obtained money under execution on judgment which was subsequently vacated, judgment creditor *held* not entitled to offset his claim for services rendered to bankrupt on ground that collection was made by him more than four months prior to bankruptcy, since upon judgment being vacated judgment creditor held money as trustee and not as creditor (Bankr. Act § 68 (a), 11 USCA § 108 (a).

◆

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Nathan Levy, as trustee in the matter of the California Olive Growers, bankrupt, against A. M. Drew. From an adverse judgment, plaintiff appeals.

Reversed.

For prior opinions, see 42 P.(2d) 1040, and 44 P.(2d) 428.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for appellant.

F. C. Huebner and A. H. Drew, both of Fresno (W. H. Stammer, of Fresno, of counsel), for respondent.

PER CURIAM.

A petition for hearing in this case after decision of the District Court of Appeal, Fourth District, was granted to give further consideration to the contention of the defendant that he was entitled to an offset against the claim of the plaintiff pursuant to section 68 of the Bankruptcy Act (11 USCA § 108). Upon such further consideration we are persuaded that the decision of the District Court of Appeal correctly disposes of that question as well as the other questions involved. We therefore adopt as the opinion of this court the following portions of the decision of that court, prepared by Mr. Justice Marks:

"This is an appeal by plaintiff from a judgment rendered in an action wherein he sought to recover from defendant the sum of $3,035.50. This sum had been collected by defendant under an execution issued on a judgment rendered in his favor in an action against the California Olive Growers, Inc., a corporation. We will refer to the California Olive Growers, Inc., as the corporation. The facts are not in dispute.

"A. M. Drew, an attorney at law, performed legal services for the corporation prior to September 19, 1927. On that day he commenced an action in the superior court of Fresno county to recover $3,025.50

from the corporation and caused its bank account to be attached. Summons was served and the parties entered into negotiations for a settlement of the claim. Pending these negotiations the default of the corporation was taken, judgment entered, and execution levied under which $3,035.50 was collected and paid to Drew. Thereafter the judgment was vacated, the default opened, and an answer filed. The case was not brought to trial and was dismissed for lack of prosecution on September 22, 1933.

"On March 27, 1928, the corporation was adjudged an involuntary bankrupt and plaintiff was appointed, qualified, and acted as its trustee. The scheduled debts of the corporation totaled $211,924.51, and its scheduled assets $17,787.45.

"On November 15, 1929, plaintiff brought this action to recover the $3,035.50 which defendant had collected under the execution. Defendant maintains that he is entitled to retain the money collected under the execution as payment of his bill for services rendered. It was stipulated at the trial that the reasonable value of Drew's services to the corporation was $3,025.50.

[1, 2] "It is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of all things taken from him under the judgment. After reversal, the respondent stands in the position of a trustee of appellant of the property obtained under the judgment. Restitution may be sought in the same or in an independent action. Ward v. Sherman, 155 Cal. 287, 100 P. 864; Asato v. Emirzian, 177 Cal. 493, 171 P. 90. The same rule should apply where a judgment has been vacated by a trial court. A judgment, when vacated, cannot be effective for any purpose. Lapique v. Plummer, 50 Cal. App. 88, at page 94, 195 P. 293; Sichterman v. R. M. Hollingshead Co., 117 Cal. App. 504, 4 P.(2d) 181; Thomas v. Lavery, 125 Cal. App. 666, 14 P. (2d) 158; Clarke v. Baird, 98 Cal. 642, 33 P. 756. We therefore conclude that defendant had no right to retain the money collected under the execution after the judgment upon which it was issued had been vacated. He urges that he caused satisfaction of the judgment to be entered after he had received the money from the sheriff. This can avail him nothing as there remained nothing to satisfy after the judgment was vacated.

[3] "There remains for determination the question of defendant's right to offset his claim for services rendered against the claim of the plaintiff for restitution of the money unlawfully held by defendant. * * *

"The rule is consistently applied in the federal courts that when a debtor, prior to bankruptcy, voluntarily places in the hands of his creditor assets for the particular purpose of extinguishing a debt, and bankruptcy occurs, the creditor can offset his demand against the claim of the trustee in bankruptcy for a return of the assets to the bankrupt estate. It is equally well settled that the unauthorized possession of funds of the bankrupt can give the creditor no right to apply them to the payment of his own claim to the prejudice of the rights of other creditors. Emerson v. Fisher (C. C. A.) 246 F. 642; Lehigh Valley Coal Sales Co. v. Maguire (C. C. A.) 251 F. 581; Alvord v. Ryan (C. C. A.) 212 F. 83; In re Interborough Consol. Corporation (C. C. A.) 288 F. 334, 32 A. L. R. 932; Parker State Bank v. Pennington (C. C. A.) 9 F.(2d) 966; In re Gans & Klein (D. C.) 14 F.(2d) 116; Cook County Nat. Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537; Hanover Nat. Bank v. Suddath, 215 U. S. 122, 30 S. Ct. 63, 54 L. Ed. 120.

"In the instant case the money was not voluntarily paid to defendant by the corporation, but was forcibly seized by the levy of an execution, nor was it voluntarily handed over to be applied on the particular debt owed to defendant. When his judgment was vacated, defendant's possession of the money became illegal and he should have restored it to his debtor. It follows that defendant cannot offset the amount of his claim against the suit of the trustee in bankruptcy for the money which he unlawfully retained but must restore it and take his place among the general creditors of the bankrupt estate."

[4, 5] "In his petition for rehearing, defendant stoutly maintains that we have fallen into error in concluding that he could not offset his bill against the California Olive Growers, Inc., against the money collected by him on the judgment against that corporation. His argument is based upon the fact that the collection was made by him more than four months prior to the bankruptcy of his debtor and the provisions of section 68 of the Bankruptcy Act (11 USCA § 108), which contains the following: 'Set-offs and counterclaims.

(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.'

"As a basis for his argument, defendant urges that he did not become trustee of the funds received by him, and if he did, the trust terminated upon the application of the funds to the payment of the judgment which evidenced the debt. He further argues that as there was no trust proven, because there was no attempt to trace the res of the trust, and as the res of the trust was not proven and identified, the evidence was not sufficient to establish a trust. The vice of this argument lies in the fact that this action need not be construed as one to recover the identical dollars paid defendant under the execution. The trust did not come into being until the order setting aside the judgment became final. Garrett v. Jensen, 44 Cal. App. 99, 186 P. 156. Up to that time the possession of the money by defendant was lawful. After that time the law imposed upon him the obligation of returning the money to the California Olive Growers, Inc. * * * The argument that the beneficiary must identify the res of the trust in the possession of the trustee before he can establish the existence of the trust needs only its statement to demonstrate its fallacy. If money forms the corpus of the trust, an unfaithful trustee would need only to mingle the trust funds with his own to defeat the trust, if defendant's argument were sound. * * *

[6, 7] "Where money is collected by a judgment creditor under a judgment which is subsequently reversed, it should be returned. Bank of United States v. Bank of Washington, 6 Pet. 8, 8 L. Ed. 299. Where money is paid by a bankrupt debtor to his creditor for a specific purpose, and is not used for that purpose, the creditor becomes a trustee and holds the money in trust. Lehigh Valley Coal Co. v. Maguire (C. C. A.) 251 F. 581. In this case it was said: 'Set-offs are authorized only in cases of "mutual debts or mutual credits." Bankruptcy Act, July 1, 1898, c. 541, § 68, 30 Stat. 565 (Comp. St. 1916, § 9652 [11 USCA § 108]). This does not enlarge or change—it only recognizes—what under general law may constitute set-offs. * * * But where a creditor receives money from his debtor, with instructions not to apply it on the debt, but to hold or use it for a specific purpose, the right of set-off does not exist, because the creditor has become, not the debtor of his debtor, but the trustee of a specific trust.'

"In Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769, and Alvord v. Ryan (C. C. A.) 212 F. 83, it was held that the right of set-off under section 68 of the Bankruptcy Act arises in the case of debtor and creditor, and not in the case where the creditor holds money of the debtor as trustee."

[8] To the foregoing we may add that the question whether the opposing claims of the parties are matter of mutual offset or counterclaim under the particular facts must be resolved adversely to the contentions of the defendant under the authorities cited. The funds came to the possession of the defendant only for the specific purpose of application to the satisfaction of a final judgment in the action commenced by him against California Olive Growers, Inc. The event upon which that application could be made, viz., the rendition of a final judgment which would entitle the defendant here to retain the funds or any part of them in satisfaction thereof, never materialized. The defendant can now find himself in no better position by reason of his actual possession of the funds than if he had been the clerk of the court or some other third person with whom the money had been deposited for the specified purpose. When the contingency upon which he would become entitled to apply the funds to his own credit failed of fruition, the fund became subject to repayment by the defendant and, in this case, to distribution to the general creditors of the bankrupt, who, it may be assumed, have claims as just and undisputed as that of the defendant. In his position the defendant is subject to the rules applicable to a trustee and, as was said in Cook County National Bank v. United States, supra: "A trustee cannot set off against the funds held by him in that character his individual demand against the grantor of the trust. Courts of equity and courts of law will not allow such an application of the funds so long as they are affected by any trust." Also, in In re Gans & Klein, supra, it was said: "Moreover, the law is equally settled that he who secures possession of property or money, upon his agreement to make certain disposition or application of it, is obligated to perform accordingly or to return the thing to him

from whom possession was received. He cannot repudiate his contract, and, in advantage of his wrong, otherwise dispose of the thing to his own benefit."

These are the guiding principles applicable in this case. The fact that the defendant came into possession of the funds more than four months prior to the entry of the decree declaring the California Olive Growers, Inc., a bankrupt, can have no potency to prevent the application of those principles under the particular facts. It follows that the defendant was not entitled to judgment on his claim of offset against the claim of the plaintiff.

The judgment is reversed.

4 Cal.2d 451

HINDMAN v. OWL DRUG CO. et al. (CORK et al., Interveners).

L. A. 14375.

Supreme Court of California.

Oct. 16, 1935.

1. Bankruptcy 🔑270

Proceeding involving attack on bankruptcy trustee's sale of bankrupt corporation's assets pursuant to order of bankruptcy court *held* collateral attack and could not be considered unless asserted invalidity or want of jurisdiction was apparent on examination of record.

2. Bankruptcy 🔑270

On collateral attack on bankruptcy trustee's sale, all presumptions will be indulged in favor of validity of proceeding.

3. Bankruptcy 🔑270

Where adjudication in bankruptcy and subsequent proceedings including trustee's sale of bankrupt's assets appeared to be correct in form and regularity of proceedings was not challenged, they could be impeached only by direct proceeding in competent court.

4. Bankruptcy 🔑100(1)

Reasons or motives actuating filing of bankruptcy petition are immaterial and do not affect adjudication if competent evidence shows bankrupt was insolvent, and such reasons or motives cannot be considered on collateral attack.

5. Bankruptcy 🔑263

Any intimate connection between purchaser of bankrupt corporation's assets at trustee's sale and bankrupt corporation would not affect validity of sale.

6. Bankruptcy 🔑268

Bankruptcy trustee's sale of bankrupt's assets, including choses in action, transferred to purchaser further right to prosecute action brought by bankrupt's stockholder in representative capacity to recover damages allegedly sustained by bankrupt because of defendants' alleged wrongful acts.

7. Appeal and error 🔑790(3)

Where judgment of trial court has become final, appeal from order denying intervention in such cause will be dismissed, since reversal of order would be unavailing.

8. Appeal and error 🔑790(3)

Where judgment for corporation approving settlement in stockholder's representative action for alleged wrongful acts against corporation was fully satisfied and had become final, appeal from order denying right of intervention by other stockholders to carry on litigation was dismissed as presenting moot question.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by W. W. Hindman against the Owl Drug Company and others, wherein J. C. Cork and others intervened. From an order striking from the files the complaint in intervention, interveners appeal.

Motion to dismiss appeal granted.

Prior opinion, 33 P.(2d) 1023.

John C. Mead, of Los Angeles, and Keyes & Erskine, of San Francisco, for appellants.

Penaat & Penaat, Joseph E. Bien, Werner Olds, William M. Maxfield, Bertram H. Ross, and James P. Sweeney, all of San Francisco, amici curiæ.

Chickering & Gregory and Donald Y. Lamont, all of San Francisco, Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, Christopher M. Bradley, of San Francisco, and E. Eugene Davis and Will J. Thayer, both of Los Angeles, for respondents.

WASTE, Chief Justice.

Appeal from an order striking from the files the complaint in intervention. The interveners appeal. On the first submission of the cause, a decision was handed down and judgment entered dismissing the appeal. On petition for a rehearing, the court granted a motion of interveners to defer action upon the motion to dismiss during the pendency of certain proceedings in the bankruptcy court instituted to vacate the adjudication of bankruptcy, upon which bankruptcy the motion to dismiss is, in part, based, and until the proceeding to vacate the bankruptcy was finally determined. That determination has now been had, McDonough v. Owl Drug Co. (C. C. A.) 75 F.(2d) 45, certiorari to the United States Supreme Court denied 55 S. Ct. 829, 79 L. Ed. 1694, and in no way adversely affects but confirms the view we adopted in our opinion.

We therefore adopt and republish the former decision, 33 P.(2d) 1023, 1024:

"Plaintiff, a stockholder in the Owl Drug Company, instituted this action in a representative capacity to recover damages alleged to have been sustained by the drug company because of alleged wrongful acts of the other defendants. An agreement was reached for the exchange of stock in another corporation for the outstanding preferred stock of the Owl Drug Company and the cancellation of an indebtedness of the drug company to the United Drug Company of $500,000, in full settlement of the alleged wrongful acts. The agreement of settlement was reported to and confirmed by the court, and judgment was entered according to its terms. The judgment was satisfied and has become final. During the progress of the litigation, other stockholders of the Owl Drug Company obtained an ex parte order from the court permitting them to file a complaint in intervention, in which it was alleged that the settlement agreement was unfair to the drug company. The court granted them the right to intervene and be heard in the proceeding then occupying its attention, that relating to the fairness of the settlement agreement, but refused them the right to intervene in the cause at large until it had passed upon the proposed settlement. The interveners refused the offer, and declined to join in the inquiry relating to the settlement agreement. The trial court thereupon struck the complaint from the files, and the would-be interveners appeal from the order 'dismissing their complaint in intervention from the files * * * and denying the right to intervene in said action.'

"Certain of the respondents now move to dismiss the appeal of appellants J. C. Cork and Orrery, Anais Hale, and Ira Abraham, upon the ground that the interveners no longer have any right to prosecute the action for and on behalf of the Owl Drug Company. This contention, which presents the only question raised by the appeal, rests upon two grounds: (1) That since the appeal was taken, the Owl Drug Company was duly adjudged a bankrupt, and under and pursuant to an order of the bankruptcy court all its assets, including all choses in action belonging to it, were sold by the trustee in bankruptcy, and therefore the interveners no longer have any right to prosecute the action on behalf of the drug company. (2) That the judgment, made and entered in the lower court, from which no appeal was taken, was fully satisfied and has become final, and constitutes a bar to further prosecution of the action, even if the right to maintain the same had not been sold at the bankruptcy sale.

"The exhibits supporting the motion conclusively establish the facts. In neither affidavits nor in their briefs do appellants challenge the basic facts upon which the grounds of the motion rest. While conceding the bankruptcy and sale of the assets of the Owl Drug Company, they seek to attack such proceedings in this action and on the appeal on the ground alleged that the bankruptcy was fraudulent because it was adjudicated upon the voluntary petition of the Owl Drug Company, and that the motive of the company in filing the petition was to destroy any right of the appellants to proceed with this appeal, that therefore the sale of the assets of the bankrupt, though confirmed by the court, is voidable and open to attack, and that the question of their right to intervene is not moot, and that, if it should be here determined that the superior court erred in striking out their complaint in intervention, they may yet attack the adjudication in bankruptcy and the sale of the assets as void.

[1-3] "We cannot agree with appellants' argument. Concerning the nature of the attack appellants seek to make on the bankruptcy proceedings through the continuance of the appeal, this court recently held an assault of that kind to be collateral in character and not to be considered unless the asserted invalidity or want of jurisdiction is apparent upon an

examination of the record in the insolvency proceeding. 'Moreover,' says the opinion, 'upon collateral attack, all presumptions will be indulged in favor of the validity of the bankruptcy proceeding, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it.' Miller v. McKenzie, 217 Cal. 389, 392, 19 P. (2d) 1, 2. The United States District Court in Nevada had jurisdiction of the voluntary petition in bankruptcy filed by the Owl Drug Company. The adjudication and the subsequent proceedings appear to be correct in form. We do not understand that appellants challenge the regularity of the proceedings. They can therefore be impeached only by a direct proceeding in a competent court. Chapman v. Brewer, 114 U. S. 158, 169, 5 S. Ct. 799, 29 L. Ed. 83; Miller v. McKenzie, supra; Larkin-Green Logging Co. v. Sabin (C. C. A. 9) 222 F. 814.

[4] "It is equally well settled that the reasons or motives which may actuate the filing of a petition in bankruptcy are immaterial, do not affect the adjudication, if it be proved by competent evidence that the bankrupt is insolvent, and cannot be considered upon a collateral attack. In re Automatic Typewriter & Service Co. (C. C. A.) 271 F. 1, 4; State of Alabama v. Montevallo Mining Co. (D. C.) 278 F. 989, 990.

[5] "It is urged by the appellants that the sale of the assets of the Owl Drug Company was made by the trustee in bankruptcy to the Union Holding Company, alleged to be a subsidiary corporation of the United Drug Company, one of the defendants below and one of the moving parties here. Assuming there was, or is, some intimate connection between the Owl Drug Company and the purchaser at the trustee's sale, we fail to appreciate what bearing such fact can have on appellants' situation. In re Witherbee (C. C. A.) 202 F. 896, 900. The sale, open to the whole world, was made by the trustee and confirmed by the bankruptcy court. Any one could have purchased who was willing to bid more for the assets of the drug company than was bid by the Union Holding Company. A trustee's sale is not invalid even though the bankrupt becomes the purchaser. In re National Mining Exploration Co. (D. C.) 193 F. 232, 237.

[6-8] "We are of the view that the bankruptcy of the Owl Drug Company and the sale by the trustee of all the bankrupt's assets, including choses in action, transferred the right to further prosecute this action to the purchaser at the sale, the Union Holding Company, and divested the appellants, or any other person, from carrying on the litigation on behalf of the Owl Drug Company. Hindman, the plaintiff, in prosecuting the action, acted only in a representative capacity. Whitten v. Dabney, 171 Cal. 621, 630, 154 P. 312. The action was to recover for the corporation, of which he was a stockholder, damages for the alleged wrongful acts of others. Appellants contend that they should be permitted to intervene, to join with plaintiff, Hindman, in order to carry on this representative action on behalf of the drug company. But, if it were possible (which it is not) for this court to reverse the order denying appellants the right to intervene at large in the action and striking the complaint in intervention from the files, appellants could not carry on in a representative action brought solely for the benefit of the Owl Drug Company. Neither the drug company nor the appellants can carry the litigation any further. The judgment in the company's favor has been fully satisfied and has become final. Where the judgment in a cause, rendered in the trial court, has become final, an appeal from an order denying intervention in such cause will be dismissed, as a reversal of such order would be of no avail. The appeal presents only a moot case. Mitchell v. Madden, 130 Cal. xviii, 62 P. 483.

"We deem further discussion of the arguments advanced unnecessary. Appellants' rights, if any they had, to prosecute the litigation for, or on behalf of, the Owl Drug Company, have ceased. The question presented by the appeal has become moot."

The motion to dismiss the appeal is therefore granted.

We concur: SHENK, J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.

STILLWELL HOTEL CO. v. ANDERSON et al.

L. A. 15321.

Supreme Court of California.

Oct. 17, 1935.

Rehearing Denied Nov. 14, 1935.

1. Appeal and error ⚿870(5)

On appeal from judgment, entered after entry of order sustaining demurrer to complaint without leave to amend, order denying leave to amend could not be assigned as error, where record failed to show that leave to amend was asked and refused between dates of order and judgment.

2. Covenants ⚿5

Specific words are not required to constitute covenant of quiet enjoyment, it being sufficient that such is manifest intent of language employed (Civ. Code, § 1927).

3. Landlord and tenant ⚿53(2)

Lessee *held* entitled to recover damages for eviction from lessor's assignee, who was purchaser of leased property, regardless of existence of privity of contract between lessee and lessor's assignee, since covenant for quiet enjoyment runs with land, and such covenant existed under facts (Civ. Code, §§ 1463, 1927).

4. Landlord and tenant ⚿53(2)

Lessee's petition against lessor's assignee, who purchased leased property subject to trust deed, for damages from eviction resulting in breach of covenant for quiet enjoyment, sufficiently alleged eviction, as against demurrer, where alleging that default was made in payment of trust deed bonds and that trustee declared entire principal due, and advertised and sold property, and that purchaser demanded possession from lessee and served statutory notice upon lessee (Code Civ. Proc. § 1161a; Civ. Code, §§ 1463, 1927).

5. Landlord and tenant ⚿180(4)

Lessee evicted in violation of covenant for quiet enjoyment may generally recover from lessor value of his unexpired term and any other damages naturally and proximately resulting from eviction.

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In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by the Stillwell Hotel Company against William H. Anderson and another. From a judgment in favor of William H. Anderson, after entry of an order sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

Prior opinion 42 P.(2d) 720.

J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

THOMPSON, Justice.

The following statement of facts, together with the preliminary observation concerning the effect of a failure to request permission to amend, is adopted from the opinion rendered by the District Court of Appeal:

[1] "This is an appeal from a judgment entered in favor of respondent, William H. Anderson, after order sustaining, without leave to amend, his demurrer on both general and special grounds to a second amended complaint against respondent and Business District Development Company, a corporation (hereinafter referred to as the company), wherein appellant sought to recover damages for eviction. The record fails to show that leave to amend was asked and refused between the dates of order and judgment; hence no error may be claimed in that respect, and appellant, having declined to amend, must stand upon his pleading as against the demurrer on both its general and special grounds. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550.

"Confining the statement of facts in the complaint to those pertinent and essential to the questions raised by the demurrer, it appears that the company was owner of certain real property and in 1925 had executed a deed of trust conveying the title thereto as security for an issue of bonds aggregating $600,000, permission to issue and sell said bonds having been granted by the state corporation commissioner. The trust deed provided that upon default in payment of interest or the principal of any bond, and request in writing signed by 25 per cent. of the holders of outstanding bonds, the trustee might declare the principal of all bonds due, and sell the property, issue its deed, and divest the company, its successor and assigns, of title and claim thereto. On January 15, 1926, the company conveyed the property to Cit-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

izens' Trust and Savings Bank (hereinafter referred to as the bank) subject to said deed of trust, and the bank made its written agreement declaring that it held the property in trust for the company, and wherein it was provided that the bank was to lease and sublease the same as directed by the company, the lessees to look only to the company as lessor; the company agreeing to perform in every particular any lease so executed. On October 20, 1926, the bank, at request of the company, executed a written lease of portions of said real property to plaintiff for a term of thirty years, wherein it was provided (a) that plaintiff should pay as rent 66 2/3 of its net earnings from operation of said property and the building thereon as a hotel; (b) that plaintiff lessee absolved the bank, as lessor, from any liability thereunder, and agreed to look to the company only for strict performance thereof; (c) that the company agreed to perform the provisions thereof in the same manner as if it were lessor therein; (d) that said lease was subject to the bond issue and deed of trust securing it, and 'that lessor agreed not to permit any default to occur in the mortgage or trust deed securing said bonded indebtedness'; and (e) that the terms, covenants, and conditions of said lease should be binding on the parties, their heirs, successors, assigns, and legal representatives. The company approved said lease in writing, wherein it agreed 'to be bound by and carry out and perform and to guarantee the faithful performance of each and all of the terms, covenants and conditions contained in said lease to be kept and performed by the lessor.'

"Under this lease plaintiff went into possession, expended $90,000 in furnishing the hotel, and established a successful business therein, with a net average income of $2,000 per month up to December 1, 1932. On January 2, 1931, all the right, title, and interest of the company and of the bank in and to said real property had passed to defendant Anderson, subject to said deed of trust securing the bond issue; and it is then alleged that on that date the bank, in consideration that Anderson would bind himself to keep and perform all the covenants and agreements of said lease, executed its assignment of all its right, title, and interest in and to the lease to Anderson, who executed thereon an acceptance wherein it is provided that he 'does hereby accept the assignment of the lease described in the foregoing, and does hereby agree to be bound as lessor by all the obligations thereof'; both the assignment and acceptance being set forth in hæc verba. It is further alleged that such acceptance agreement was executed for the express benefit of plaintiff as lessee, and that thereafter plaintiff performed the covenants and agreements of the lease for the benefit of defendant Anderson, and that the latter claimed all the rights, benefits, and privileges of said lease until he permitted default in the terms of said trust deed and plaintiff was evicted by reason thereof.

"On March 1, 1932, certain of the bonds aggregating $20,000 'became due and payable and default was made in the payment thereof,' and on September 1, 1932, 'there became due and payable the interest on all of said bonds then outstanding in the sum of $16,250, and default was made in the payment thereof.' On October 10, 1932, the owners of more than 25 per cent. of outstanding bonds requested the trustee in writing to declare the principal of all the bonds due and payable and to proceed to sell said property as provided in said deed of trust. On October 11, 1932, the trustee gave notice in writing to the company and to defendant Anderson declaring the principal of all bonds to be immediately due and payable, and advertised a sale and on November 12, 1932, sold the property to Title Insurance & Trust Company as trustee for Mortgage Guaranty Company, the owner of all outstanding bonds. It is then alleged that said proceedings and sale were 'in all respects in full compliance with the terms of the deed of trust and the provisions of law,' and divested defendants of all title and interest in said property and terminated said lease of plaintiff; that on December 3, 1932, said Mortgage Guaranty Company demanded of plaintiff possession of said property and 'served written notice and demand on plaintiff as provided by section 1161a of the Code of Civil Procedure to quit possession thereof within three days or it would institute proceedings against plaintiff for possession of said property and for recovery of damages'; that by reason of the termination of said lease plaintiff was compelled to and did quit possession of said premises on December 8, 1932, and as a result was forced to make immediate sale of its furniture and furnishings for $16,000, although they were reasonably worth $50,000, to its damage in the sum of $34,000; that by reason of the termination of said lease it lost the use of said premises for 275 months, to its damage in the sum of $200,000, demand for which sums have been made by plaintiff of defendants and defendants have refused to pay the same of any part thereof; and that there is now due and unpaid the sum of $200,000."

The respondent contends that the complaint is fatally defective because it fails to disclose a privity of contract between him and appellant, or a contract made expressly for appellant's benefit, but in fact discloses no liability on the part of the trustee bank, hence makes it apparent that there was no liability for him to assume. He further asserts that the allegations are insufficient to show an eviction, and that the averments of damage are hopelessly unintelligible.

[2, 3] It is apparent that respondent misconceives the basis of the liability sought to be alleged. No specific words are required to constitute a covenant of quiet enjoyment. If it be manifest that such was the intent and purpose of the language employed, it is sufficient. Allan v. Guaranty Oil Co., 176 Cal. 421, 428, 168 P. 884. In this case it is obvious from the allegations of the appellant that it was the intent of the parties that the lessee should not be disturbed in his possession and use of the premises by the foreclosure of the trust deed or mortgage securing the bond issue. It is perhaps helpful to note in this connection that section 1927 of the Civil Code provides for an implied covenant of quiet enjoyment during the term arising from the fact of the hiring.

By section 1463 of the Civil Code it is provided that the covenant "for quiet enjoyment" runs with the land. In the present instance this Code provision is reinforced by the stipulation of the parties that the covenants and conditions of the lease should inure to the benefit of and bind not only the parties to the lease, but "each and every one of the heirs, executors, administrators, successors and assigns and legal representatives of the party to said lease." In discussing another covenant running with the land, it was said in Bonetti v. Treat, 91 Cal. 223, 229, 27 P. 612, 613, 14 L. R. A. 151: "The assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this without reference to any obligation assumed by him in the contract of assignment." This language was quoted with approval in Baker v. Maier & Zobelein Brewery, 140 Cal. 530, 534, 74 P. 22. In 15 California Jurisprudence 632 it is said: "It may be noted here, however, that the following covenants run with the land and bind the successors in interest of the parties by privity of estate: the covenant to pay rent, a covenant to pay taxes, the lessor's covenant of warranty and quiet enjoyment. * * *" The rule is well established and its recognition makes it unnecessary for us to discuss the questions raised by respondent concerning whether there was a liability founded upon the existence of privity of contract.

[4] We may turn to the assertion that there are insufficient allegations of an eviction. As we have observed, the complaint alleges that default was made in the payment of certain bonds falling due, and in the payment of interest due on all of the bonds; that thereafter, upon demand of a sufficient number of the bondholders, the trustee declared the entire principal due; advertised the property for sale; sold it; and that the purchaser demanded possession of appellant and served upon it the written notice provided for by section 1161a of the Code of Civil Procedure to quit possession or it would institute proceedings for possession and damages. In view of the wording of the particular covenant here in question, it cannot be doubted that appellant sufficiently alleged its eviction from the premises and a breach of the covenant. It alleged facts sufficient to show the assertion of a paramount title and right to possession. Under the authority of Allan v. Guaranty Oil Co., supra, the allegations of eviction were sufficient against the demurrer.

[5] With regard to the averments of damage, appellant alleged, in effect, the loss of the use of the premises to the end of the term, and alleged the loss incurred by reason of its forced removal. The general rule of damages is that the lessee may recover the value of his unexpired term and any other damage which is the natural and proximate result of the eviction. Klein v. Lewis, 41 Cal. App. 463, 467, 182 P. 789.

It follows that the demurrer should have been overruled, and the defendant required to answer.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

SUPREME GRAND LODGE OF ANCIENT AND MYSTICAL ORDER ROSAE CRUCIS v. SMITH et al. *

S. F. 15061–15308.

Supreme Court of California.
Oct. 21, 1935.

Rehearing Granted Nov. 18, 1935.

Appeal and error 🔑787

Appeal would be dismissed after lapse of two and one-half years from entry of judgment where appellant made no serious effort to perfect his appeal or to put it in shape for submission.

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In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by the Supreme Grand Lodge of the Ancient and Mystical Order Rosae Crucis, a corporation, against George L. Smith and others. From the judgment, the defendants appeal. On motion for order dismissing appeal.

Motion granted and appeal dismissed.

Ivan G. McDaniel, of Los Angeles, for appellants.

Bohnett, Hill & Cottrell, Louis Oneal and Alfred Aram, all of San Jose, for respondent.

WASTE, Chief Justice.

There comes before us a motion for an order dismissing an appeal from a judgment entered in the action on June 19, 1933. The motion to dismiss, supported by the clerk's certificate, was filed here September 7, 1933. The filing of the motion was followed by affidavits in opposition, substitution of attorneys, months of delay, many continuances, nonappearance from either side at the hearings, and negotiations between counsel. On October 2, 1934, the appeal was dismissed, but, at the request of appellant, a rehearing and further continuance were granted for a hearing on the motion. Finally, on November 1, 1934, the transcript was filed, but nothing further was done by appellant to perfect the appeal.

After more continuances, the respondent again brought up the motion to dismiss, and, after time allowed for filing points and authorities by each side, the matter was recently submitted, and we are called upon to dispose of the motion to dismiss fully two and a half years after judgment was entered in the lower court.

It does not appear that appellant made any serious effort to perfect his appeal or to put it in shape for submission.

The motion is granted, and the appeal is dismissed.

We concur: SHENK, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; THOMPSON, J.

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4 Cal.2d 447

SPANACH et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 15337.

Supreme Court of California.
Oct. 14, 1935.

Certiorari 🔑5(1)

Where trial court was within its jurisdiction in staying proceedings pending arbitration in a tort action and in denying motion to be relieved from such order, its action therein could not be reviewed by Supreme Court on writ of certiorari, since writ could not be used as writ of error, or as substitute for remedy of appeal (Code Civ. Proc. § 473).

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In Bank.

Application by Steven N. Spanach and another against the Superior Court of the County of Los Angeles and another, to review an order of such named court staying proceedings pending arbitration in an action for damages for malpractice.

Writ denied.

See, also (Cal. App.) 43 P.(2d) 339.

Russell Parsons, Joseph L. Fainer, and W. V. Anderson, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy Co.

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*For subsequent opinion see 51 P.2d 89.

Counsel, both of Los Angeles, for respondents.

WASTE, Chief Justice.

We are in agreement with the following portions of the opinion heretofore prepared in this proceeding by Mr. Presiding Justice Stephens when the same was pending before the District Court of Appeal, Second Appellate District, Division 2, and we adopt the same, with some additional comment, as and for the decision of this court:

"This is a petition for a writ of review of a proceeding in the superior court which may be briefly stated as follows: Heretofore petitioners brought suit for damages alleged to have resulted from medical malpractice against certain physicians individually and as members of a copartnership of physicians designated as 'Ross-Loos Medical Group,' hereinafter referred to as 'Medical Group.'

"Although the complaint alleges that petitioners are members of the Medical Group, a reading of the pleadings and exhibits reveals that, instead of being members, petitioner Steven N. Spanach was, at the times herein concerned, a member of a voluntary association known as 'Los Angeles Police Relief Association.' Such 'Relief Association,' as it will hereafter be designated, and 'Medical Group' entered into a long and detailed 'Memorandum of Agreement' by the terms of which the Medical Group became obligated to furnish certain medical and allied services to 'subscribers' or members and their families of the 'Relief Association.' Elna Marie Spanach, the other petitioner, was the wife of Steven N. Spanach, and the alleged malpractice relates to treatment accorded her by a physician attached to the Medical Group.

"The superior court action reached the point of taking testimony when defendants requested leave to amend their answers by alleging that said agreement provided that the alleged cause of action was subject to compulsory arbitration. The amendments were finally allowed, and plaintiffs (petitioners here) by their counsel orally acceded to arbitration. Before such accession, however, there was much discussion turning on the effect of the arbitration provision of the agreement and the court suggested that it was probably without jurisdiction to proceed with the case and that its jurisdiction could be tested by a writ of mandate. Thereafter the court made an order that all proceedings should be stayed 'until arbitration might be had in accordance with the arbitration agreement.'

"Subsequently thereto, plaintiffs-petitioners moved the court under section 473, Code of Civil Procedure, to be relieved from the order of the superior court staying 'proceedings until arbitration has been had in accordance with the terms of the arbitration agreement' (quoting from the order) and therein petitioned that said order and all other orders made by the court in relation thereto be set aside and that the court declare a mistrial of such action; the grounds of the motion were that counsel in acceding to arbitration, acted under mistake, believing at the time that the arbitration provision of the agreement covered the alleged cause of action but that in fact this was erroneous. The court denied the motion.

"Petitioners here claim that the court was without jurisdiction to decline to proceed with the trial until after arbitration had been had. It is upon this claim that this proceeding depends.

"Without question the court was within its jurisdiction when, after the plaintiffs acceded to arbitration, the proceedings were stayed. Equally clear is the proposition that the court was within its jurisdiction to entertain the motion under section 473, Code of Civil Procedure, and to rule thereon. Its ruling is subject to appeal, but, being a discretionary matter, the ruling is not subject to review in this proceeding."

The foregoing is determinative of the present proceeding. If, as we have seen, the court below was within its jurisdiction in staying further proceedings pending arbitration, to which the plaintiffs acceded, and if, as stated above, it was within its jurisdiction in denying the motion made under section 473, supra, for relief from such order, this is not a proper case for the issuance of a writ of certiorari. The authorities are legion to the effect that where a court has jurisdiction of the parties and of the subject-matter of the action, such jurisdiction carries with it the authority to decide the questions submitted to it, incorrectly as well as correctly. Accordingly, error in the exercise of its jurisdiction, however gross, cannot be annulled on certiorari. Culver v. Superior Court, 185 Cal. 144, 195 P. 1055; American Law Book Co. v. Superior Court, 164 Cal. 327, 128 P. 921; In re Hughes, 159 Cal. 360, 113 P. 684; Erickson v. Municipal Court, 219 Cal. 737, 739, 29 P.(2d) 192, 193. In the last-cited case the following appears: "If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it."

In other words, the writ of certiorari cannot be used as a writ of error, or as a substitute for the remedy of appeal, to correct the errors, either of law or fact, committed by an inferior tribunal within the limits of its jurisdiction. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; Valentine v. Police Court, 141 Cal. 615, 75 P. 336.

The writ is denied.

We concur: SHENK, J.; THOMPSON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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4 Cal.2d 425

CLAYTON et al. v. SCHULTZ et al.

S. F. 15304.

Supreme Court of California.

Sept. 30, 1935.

Rehearing Denied Oct. 28, 1935.

1. Taxation 🔑414

Failure to make assessment in name of remainderman as well as in name of holder of life estate does not render assessment invalid or irregular (Pol. Code, § 3628, as amended by St. 1925, p. 13; Civ. Code, § 840).

2. Taxation 🔑757

Tax deed which followed statutory form in identical language and which showed that purchaser paid sum in excess of lowest bid acceptable under notice, and that he redeemed thereafter by paying all other taxes subsequently levied against property *held* not objectionable on its face (Pol. Code, §§ 3764, 3785b).

3. Taxation 🔑658(3)

Failure of notice of sale made in 1931 for delinquent taxes which had been levied in 1926 to separately state items of taxes, penalties, and costs, as required by statute prior to 1929, did not render notice of sale defective, in view of 1929 amendment validating notices of sale which failed to enter taxes, penalties, and costs as separate items, but entered such amounts in one total sum (Pol. Code, §§ 3747, 3764, 3771, 3771a).

4. Taxation 🔑688

Statute validating publication of delinquent tax list or notices of delinquent tax sales which failed to enter taxes, penalties, and costs as separate items, but entered such amounts in one total sum *held* not unconstitutional as having retrospective operation, in absence of intervening rights (Pol. Code, §§ 3747, 3764, 3771, 3771a).

5. Statutes 🔑269

While declaratory statute cannot bind courts with respect to application of original statute to transactions which occurred or rights of action which accrued prior to passage of declaratory statute, statute declaratory of former statute has same effect as if embodied in original statute at time of its passage, in absence of intervening rights.

6. Taxation 🔑620

Entry of sum due for 1931 on delinquent tax list for 1931 did not invalidate sale for delinquent taxes for year 1926 where purchaser paid amounts assessed subsequently to 1926 within thirty days from sale (Pol. Code, § 3764).

7. Taxation 🔑693

Supreme Court would assume that statutory procedure relating to delinquent tax sales was followed in absence of complete record of tax sale proceedings.

8. Taxation 🔑788(3)

Tax deed, in due form, is prima facie evidence of compliance with requirements preliminary thereto and casts on persons objecting to validity of deed burden of proving any irregularity in proceedings prior to execution and delivery of deed.

9. Appeal and error 🔑1177(9)

Judgment would not be entered by Supreme Court in favor of purchaser at delinquent tax sale on reversal of judgment declaring purchaser's title invalid where both parties were lax in their efforts to complete record sufficiently to bring cause to proper determination.

10. Taxation 🔑830

Where delinquent tax proceedings are defective, purchaser at delinquent tax sale must be reimbursed for taxes, costs, penalties, and expenses incurred in his attempt to secure title from the state where evidence is introduced as to amount of such items, and must account for rentals collected from property during period of possession under tax deed.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action to quiet title by A. D. Clayton against William A. Schultz, Jr., and others, in which Phineas D. Clayton intervened. From a judgment for the defendants and from an order denying intervener's motion for new trial, the intervener appeals.

Judgment and order reversed.

J. E. White and Abraham Setzer, both of San Francisco, for appellant.

Thomas T. Califro, of San Francisco, for respondent.

PER CURIAM.

Action to quiet title to certain real property located on Sacramento street, San Francisco. The issues as finally joined resolved the case into a contest between the plaintiff in intervention, claiming title to the property by virtue of a delinquent tax sale and tax deed, and defendants Schultz and the Fischers and their successor, Alma Investment Company, claiming continued ownership of the property and invalidity of the tax sale proceedings. Plaintiff in intervention, Phineas D. Clayton, produced a certified copy of judgment rendered in an action between the purchaser at the tax sale, who was his brother, plaintiff A. D. Clayton, and himself, wherein it was adjudicated that said purchase was made with his money and the property was held in trust for him by said brother and was his property. The word "plaintiff" will be used herein to refer to said plaintiff in intervention in the same manner as though he himself had been the purchaser at the tax sale.

Plaintiff introduced in evidence the deed issued by the San Francisco tax collector on July 1, 1932, which recited sale of the property "for nonpayment of delinquent taxes which had been legally levied in said year 1926, and were a lien on said real property, the total amount for which the same was sold being $133.00; and whereas all taxes levied and assessed against said property prior to the year 1931 have been paid and discharged. * * *" Plaintiff took possession of the property subsequent to issuance of this deed and thereafter received the rentals therefrom.

Defendants introduced evidence intended to show their unbroken chain of title to and ownership of the property. They asserted that the procedure followed on notice and sale for delinquent taxes failed to satisfy statutory requirements and that the tax deed on its face was void. In this connection they introduced in evidence the following entry from the delinquent tax list for the year 1931 and notice of sale contained therein:

"Schultz, Wm. A., Jr. Lot No. 13 and Improvements ....143.15 To be sold at public auction on June 30, 1932. See sale No. 1 in Addenda to this list."

Also the notice of sale as contained in said addenda to the 1931 delinquent tax list which recited, among other things, that the property would be sold commencing June 30, 1932, at 11 a. m., in the office of the San Francisco tax collector, and that "no bid for said property will be accepted for less than the amount of all taxes, penalties and costs due on said property for the year the same was sold to the State, which minimum amounts are set forth opposite the description of each of said properties. In order to entitle the successful bidder to a deed of the property purchased he must, in addition to the price paid pursuant to his bid at such sale, within thirty (30) days pay by redemption any and all further delinquent taxes and assessments against said property, together with all penalties, costs, interest and charges accrued thereon. * * *"

Underneath, in large type, appeared the heading: "Delinquent Taxes of 1926"; under the column "sale No.," appeared the figure "1"; under the column "name and description" appeared "Wm. A. Schultz, Jr. The lot of land No. 13 in Block No. 1007 and Improvements. Both installments. Sale No. 246"; under the title "Least amount that may be bid" appeared the figures "132–67."

Defendants also produced the following entry from the delinquent tax list for the year 1926–1927: "Block 1007. Schultz, Wm. A., Jr. Lot No. 13 and Improvements . . . . . 132–67."

Upon the evidence, practically all of which is above set forth, the court made findings for defendants and against plaintiff. The vital findings were to the effect that in the proceedings leading up to the sale and in making the sale neither assessor nor tax collector complied with the provisions of the Political Code; hence the purchaser acquired no interest in said property by virtue of said sale and tax deed, both being null and void. Judgment followed decreeing defendant Alma Investment Company to be the owner of and entitled to possession of said property. Thereafter, upon the hearing of plaintiff's motion for new trial, the court made its "order, adding to findings of fact and conclusions of law, modifying judgment and denying motion for new trial." This document recited that there had been a failure to find the amount of money expended by the purchaser in connection with said tax sale and to provide for his reimbursement, wherefore the court found that said purchaser had expended $133, for which sum defendants must reimburse plaintiff as a condition to entitle them to the decree annulling said tax deed. Immediately thereafter defendants tendered said sum of $133 and, upon order of the court, deposited it with the clerk to plaintiff's credit. Plaintiff appealed from the judgment and from said order of amendment, modification, and denial of new trial, made after judgment.

Appellant contends that the findings are obviously insufficient to support the judgment in that they consist only of conclusions of law. In other words, that the court merely concluded that statutory requirements had not been fulfilled without finding, as a basis of fact for such conclusion, what the noncompliance with statute was or in what manner the tax proceedings were defective. We would not accord weight to this claim if it were true, as contended by respondents, that the evidence relating to the tax sale revealed on its face that the proceedings were defective, but, so far as the record discloses, we can ascertain no basis for concluding that there was a noncompliance with statutory requirements.

[1] The property was assessed in 1926 in the name of Wm. A. Schultz, Jr. Respondents claim that this assessment was irregular as at said time said defendant was only the holder of a life estate, defendant Elvira Fischer being the owner of the remainder interest in said property. Assuming for purposes of this discussion that such ownership was sufficiently established, the fact that the assessment was not made in the name of the remainderman as well as in the name of the holder of the life estate, did not render it invalid or irregular. Section 3628, Pol. Code, Stats. 1925, p. 13; section 840, Civ. Code.

There are two methods of selling and transferring real property for nonpayment of taxes subsequent to expiration of the period of redemption. The one which was here followed is provided for mainly by sections 3764, 3771a, and 3785b of the Political Code, being a sale in the ordinary course, by which the purchaser is required to bid sufficient to pay the original tax, with penalties and costs, plus whatever amount is necessary to make him the highest bidder, and by which he secures a right to redeem the property upon payment of taxes subsequently assessed, whereupon, if he redeems, a conveyance may be made to him without the formality of making a deed to the state in the first instance. 24 Cal. Jur. pp. 344, 345, § 321.

[2] The deed before us, on its face, is not subject to criticism. It follows in identical language the form prescribed by section 3785b of the Political Code. It shows that the purchaser paid for the property $133, a sum in excess of the lowest bid acceptable under the notice ($132.67 to cover 1926 delinquent taxes, penalties, and costs), and also redeemed thereafter by paying all other taxes levied and assessed against said property prior to the year 1931 (see section 3764, giving purchaser a thirty-day period of redemption within which to make this latter payment).

[3] There is no merit in respondents' claim that the notice of sale was fatally defective in failing to separately state the items of "taxes, penalties and costs," as required prior to 1929—this on the theory that the applicable law is the law as it stood in 1926 which controls the period of redemption. Risso v. Crooks, 217 Cal. 219, 220, 17 P.(2d) 1001; Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194. It is true that prior to 1929, following decision in the case of Gottstein v. Kelly, 206 Cal. 742, 276 P. 347, the possible construction to be placed upon the provisions of sections 3747 and 3764 of the Political Code was that taxes, penalties, and costs should be separately shown on the publication of delinquent lists and notices of sale under sections 3771 and 3771a. In that year, however, the Legislature amended these provisions by requiring that the delinquent list show only "an amount equal to the total amount of all taxes, as-

sessments, penalties, and costs due" (section 3764), and in passing the amendatory act (St. 1929, p. 742), specifically declared that the amendments were "not a change in, but a statement and declaratory of the law as the Legislature intended it to be by the terms of those sections prior to" the amendment (section 4). Section 4 further provided: "All publications of delinquent lists or notices of sale under sections 3771 and 3771a of the Political Code failing to enter taxes, penalties and costs as separate entries but entering the foregoing amounts in one total sum and all sales * * * tax deeds * * * based upon such entries * * * are hereby confirmed, validated and legalized." By section 5 the amendment was declared to be an urgency measure. Furthermore, in an explanatory note, the Legislature stated the necessity for the amendment, due to said decision in the Gottstein Case, supra, because the tax collectors of the state had completed preparatory work on the publication of the delinquent list to be published on or before June 8, 1929, and great expense would be involved in changing it to state separately said items, with possibility of error and jeopardizing of many tax titles acquired at tax sales.

[4, 5] Respondents contend that so much of the 1929 amendment as is declaratory of the meaning of the said statutes, with intent to give them a retrospective operation, is unconstitutional. In view of the nature and purpose of the amendment, so far as here applicable, we see no reason to declare it unconstitutional. While a declaratory statute cannot bind the courts with respect to application of the original statute to transactions which occurred or rights of action which accrued prior to passage of the declaratory act, yet, in the absence of intervening rights, an act declaratory of a former one has the same effect as if embodied in the original act at the time of its passage. 12 C. J. p. 811, § 247.

[6] No error appears by reason of the entry of the item of $143.15 on the 1931 delinquent tax list. The property was sold for delinquent taxes for the year 1926, penalties and costs, covered by the payment of $133, and within thirty days thereafter the purchaser redeemed by making an additional payment sufficient to cover sums subsequently assessed. The record fails to reveal the items making up this redemption payment, but the sum of $143.15 was apparently due for the year 1931–1932.

[7, 8] Respondents, in a brief written in reply to appellant's reply brief, for the first time asserted numerous other alleged defects in the proceedings, to wit: That the tax collector did not append and publish with the delinquent list the notice provided by section 3765, Political Code, did not comply with section 3767, or publish notice pursuant to section 3746, etc. Insufficiency of the record precludes consideration of these claims. While the entire delinquent tax lists for 1926 and 1932 were apparently admitted in evidence, only portions thereof were copied into the transcript. We are furnished with no complete record of the tax sale proceedings. In the absence of a further showing, we must assume that the statutory procedure was properly followed. The tax deed, in due form, was prima facie evidence of compliance with requirements preliminary thereto and cast upon respondents the burden of proving any irregularity in the proceedings prior to its execution and delivery. 24 Cal. Jur. §§ 357, 367, 369, p. 398. This burden respondents failed to sustain.

[9] The above views, requiring a reversal of the judgment, render unnecessary a discussion of the effect of said order made after judgment, which must also be reversed. But appellant further requests that we order entry of judgment in his favor. This we must decline to do. Upon trial of this cause both parties were lax in their efforts to complete the record sufficiently to bring the cause to proper determination. Respondents failed to produce records establishing their ownership of the property at the time the assessment was made, contenting themselves with introduction of an assessor's memorandum showing that title passed by decree of distribution in 1923. Respondents also failed to furnish a sufficient record of the tax sale proceedings, as above set forth. Appellant, on the other side, erred in waiting until presentation of his motion for new trial to demand reimbursement for sums expended in acquiring the property from the state. This resulted in the questionable order of the court made after judgment allowing him $133, the only specified sum shown to have been expended, although it is evident he also made the required redemption payment in an unspecified sum to cover taxes, penalties, and costs over the redemption period. He also received rentals from the property.

[10] As the cause may be retried and the tax proceedings may be shown to have been defective, we might add that in such event the purchaser must be reimbursed for all taxes, costs, penalties, and expenses incurred in his attempt to secure title from the state, with foundation for such award laid by introduction of evidence as to the amount of these items. Pol. Code, § 3898, subd. 5; Warden v. Ratterree, 215 Cal. 215, 9 P.(2d) 215, 86 A. L. R. 1204; Sawyer v. Berkeley Securities Co., 99 Cal. App. 545, 279 P. 217; Redman v. Newell, 114 Cal. App. 215, 299 P. 746; Scott v. Warden, 111 Cal. App. 587, 296 P. 95. The purchaser may also be held to account for rentals collected from the property during the period of possession under the tax deed. Denning v. Green, 119 Cal. App. 102, 6 P.(2d) 317. On the subject of respondents' right, should they prevail, to an affirmative decree quieting their title, in view of the fact that their amended answer contained none of the elements of a cross-complaint and no prayer for affirmative relief, see Risso v. Crooks, supra.

The judgment and order appealed from are reversed.

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9 Cal.App.2d 450

SEEBERG v. SEEBERG.

Civ. 5357.

District Court of Appeal, Third District, California.

Oct. 11, 1935.

1. Gifts 🔑1

"Gift" is something voluntarily transferred from one to another without consideration.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

2. Appeal and error 🔑1010(1)

Finding that wife's statement to husband who had purchased realty with his separate funds that, unless he placed property in their joint names, she would leave him, constituted such undue influence as justified decree that property transferred was separate property of husband, and that wife never had title or interest therein, would not be disturbed.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Jacob Seeberg against Matle K. Seeberg. From a judgment, defendant appeals.

Affirmed.

C. Douglass Smith, of Long Beach, for appellant.

Henry Cohen, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This controversy arose in an action for a divorce and involves the ownership of certain real property.

Respondent, as plaintiff in an action for divorce, alleged that certain described lands were his sole and separate property. During the marriage plaintiff purchased the property in question, and, after making the purchase, told his wife of his action. She thereupon insisted that the title be taken in their joint names. Plaintiff at first demurred, but, upon the statement of the wife that she would leave him unless he complied with her demand, plaintiff thereupon caused the title to be taken in their joint names.

The court, however, found the real property in controversy was owned, purchased, and acquired by plaintiff out of his separate funds, and constituted the separate property of plaintiff, in which defendant had no claim or interest.

The question involved as stated by plaintiff is, "Does the mere statement of a wife to her husband, who had purchased real property with his separate funds, that unless he placed said property in their joint names, she would leave him, constitute such undue influence as would justify the trial court in decreeing that the property so transferred was the separate property of the husband, and that the wife never had any right, title or interest therein?"

[1] Both in law and in the common acceptance of the meaning of the word, a gift is something voluntarily transferred from one to another without a consideration.

The question for the trial court to determine was whether the transfer from the husband to the wife was voluntary or whether there was such undue persuasion in obtaining an interest in the property as to defeat the deed.

[2] The trial court so found, and we cannot say as a matter of law that such a

statement as here made by appellant to respondent under the circumstances here existing does not constitute undue influence.

No other point having been urged for reversal, the judgment should be affirmed, and it is so ordered.

I concur: THOMPSON, J.

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9 Cal.App.2d 583

WALTEMATH v. WESTERN STATES REALTY CO. et al.

Civ. 9426.

District Court of Appeal, Second District, Division 1, California.

Oct. 19, 1935.

Hearing Denied by Supreme Court Dec. 17, 1935.

1. **Pleading 🔑62**

In tenant's action against owner of apartment and employees in charge of building for injuries received when plaintiff fell at night on unlighted stairway, allegation that servants had complete charge of premises *held* mere allegation that employees were in complete charge of premises as between plaintiff and employees, and not waiver of owner's separate liability (Gen. Laws 1931, Act 8548, § 66).

2. **Master and servant 🔑333**

Duty of owner to exercise reasonable care to maintain apartment in safe condition for tenants *held* independent as well as related to duty of employees in charge of building, and hence exoneration of employees did not relieve owner from liability for injuries to tenant (Gen. Laws 1931, Act 8548, § 66).

3. **Trial 🔑328**

Where defendant is in law and in fact responsible, exoneration of codefendant will not relieve him of legal consequences of responsibility.

4. **Landlord and tenant 🔑168(1)**

In tenant's action for injuries received when she fell at night on unlighted stairway in apartment building, undertaking of plaintiff to traverse dark and defective hall and stairway *held* not contributory negligence (Gen. Laws 1931, Act 8548, § 66).

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Helen K. Waltemath against the Western States Realty Company and others. From an adverse judgment, the named defendant appeals.

Affirmed.

George L. Greer, of Los Angeles, for appellant.

Holbrook, Taylor, Tarr & Reed, of Los Angeles, and Towman & Noble, of Glendale, for respondent.

DORAN, Justice.

Plaintiff sued for damages for personal injuries sustained by her due to a fall, at night, upon an unlighted stairway of the apartment building where she was a tenant. The defendants Miller, O'Conner, Dean, and Bartholomew were the manager, assistant manager, maid, and janitor, respectively, of the apartment building and the employees of defendant Western States Realty Company, the owner. The jury found for the plaintiff, against the Western States Realty Company, and for the other defendants above named. The defendant corporation appeals.

The complaint alleges and the answer admits that Miller, as manager, "had full and complete charge of said premises and was responsible for the condition thereof and for the maintenance thereof in a good and safe condition"; that defendant O'Conner was also charged with such responsibility in the absence of Miller; that the maid and janitor were "engaged in the business of cleaning the halls and stairways and keeping the same in a clean, safe and usable condition"; that on the night in question "the hallways were wholly unlighted by any means and dark and, that the hallway alongside of the rear stairs and leading to the rear stairway was not artificially lighted, as required by law, and that defendants allowed such darkened condition to continue for a long period of time; that said hallway and stairs were maintained by the defendants and each of them for the use of the occupants of said apartment house." The requirements of the Tenement Housing Act, section 66 of Act 8548, General Laws, with respect to lighting of apartment houses were alleged; also that defendants negligently allowed a piece of carpet adjacent to the stairway, to be loose, curled, and broken and in a greasy and slippery condition, over which plaintiff tripped or slipped and fell down the stairs.

[1] Appellant contends, first, that because the complaint alleged, and the answer admitted, that the defendant Miller and O'Conner had full and complete charge of the premises and were responsible for the condition thereof and the maintenance thereof in a good and safe condition, and that the jury found in favor of these defendants, such finding exonerated the defendant owner; second, that plaintiff was guilty of contributory negligence.

The first contention is unwarranted. The allegation simply means that as between plaintiff and the servants, they, the servants, were in full and complete charge of the premises. Such an allegation cannot reasonably be interpreted as a determination and waiver of the liability of the defendant company. It was unnecessary to allege the legal duty of a landlord that results from the relation of landlord and tenant. Moreover, the complaint alleged that the defendants negligently and carelessly allowed and permitted the hallway to be in a dangerous and negligent condition and allowed the rug to be loose, curled, and bent, etc.

[2, 3] The appellant relies upon the rule that where recovery is sought based upon the act or omission of an agent, whom a principal did not direct and in which the principal did not participate, and where, thus, his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent, the effect of a judgment exonerating the agent is such that the principal is thereby relieved of responsibility. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171. The rule, however, is not applicable here. The duty and responsibilities of the defendant company, in the case at bar, were independent, as well as related. If a defendant is in law and in fact responsible, the exoneration of a codefendant will not relieve him of the legal consequences of his responsibility. The contention of appellant that the negligence was exclusively that of the employees cannot be sustained.

[4] The second point, viz., that because the plaintiff undertook to traverse the dark and defective hall and stairway she was guilty of contributory negligence, is without merit. No other points are raised by the appeal.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 473

Ex parte JOHNSON.

Cr. 2765.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1935.

1. Contempt 🔑24

To constitute contempt, it is essential that thing ordered to be done is within power of person.

2. Contempt 🔑21

Where judgment creditor sold collateral pledged with indemnity company on judgment debtor's stay bond pending appeal of cause and it did not appear that indemnity company was under any liability on such stay bond, trial court was without jurisdiction to adjudge judgment creditor guilty of contempt in failing to pay over to liquidator of indemnity company under court order proceeds derived from sale of collateral in excess of judgment.

Petition by James A. Johnson for a writ of habeas corpus.

Writ granted.

F. H. Bowers, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

YORK, Justice.

This matter comes before us on an amended petition for writ of habeas corpus and the return thereto. James A. Johnson, petitioner herein, was held in custody under an order made by the superior court finding him guilty of contempt of court and sentencing him to pay a fine of $250, or, in lieu thereof, to serve one day in the county jail for each $2 of the unpaid balance. The basis of the contempt order was the failure of the petitioner to deliver money and other property to the liquidator of the Benjamin Franklin Bond & Indemnity Corporation.

A condensed statement of the facts involved in this transaction is as follows: E. Forrest Mitchell, as insurance commissioner of the state of California, was the duly appointed, qualified, and acting liquidator of the Benjamin Franklin Bond & Indemnity Corporation, and as such was entitled to and did take possession of the business of the said corporation. Prior to the date of the order appointing said Mitchell as such liquidator, said corporation filed its stay bond on appeal in the superior court on behalf of Myra Johnson, defendant in a divorce action brought by this petitioner against her, the judgment in which case was affirmed on appeal. Subsequent to the time of entry of judgment in the divorce action, in order to obtain possession from Myra Johnson of a certain piece of property awarded to this petitioner in the divorce action, petitioner brought an action in unlawful detainer against said Myra Johnson in justice's court for Montebello township, and judgment therein was rendered in favor of this petitioner for the sum of $930 and costs; whereupon said Myra Johnson appealed to the superior court from that judgment without filing a stay bond on appeal. After the rendition of the judgment in the justice's court and during the pendency of the appeal therefrom, the petitioner here procured an order of the superior court requiring the liquidator of the Benjamin Franklin Bond & Indemnity Corporation to deliver to said petitioner in satisfaction of his justice's court judgment certain property theretofore hypothecated with said corporation by said Myra Johnson, as collateral security on her stay bond on appeal in the original divorce action. The property so ordered to be delivered to this petitioner was described in the order as follows: "Deed of Trust covering Lot 23, Block 12, Tract 4301, * * * as per map recorded in Book 50, pages 98 and 99 of Maps * * *

"Certificate of deposit, Farmers and Merchants National Bank, No. 11650, in the sum of Five Hundred Seven and 50/100 ($507.50) Dollars."

In addition, the order directed that the proceeds of said property and money be applied to the satisfaction of said judgment in the said total sum of $966, and that the said petitioner "shall foreclose said Deed of Trust according to law, and any amount remaining after the satisfaction of said Judgment, in said sum of Nine Hundred Sixty-six ($966.00) Dollars, after deducting the cost of said foreclosure, shall be delivered and paid to E. Forrest Mitchell, as Liquidator for the said Benjamin Franklin Bond and Indemnity Corporation, a Corporation."

Pursuant to said order, petitioner received said certificate of deposit and interest and did apply the total sum of $522.73 to the satisfaction of the judgment named in the order, leaving a balance due petitioner on said judgment of $966, the sum of $443.27. Subsequent to the making of said order and the application by petitioner of the sum of $522.73 to the satisfaction of his judgment, the latter-named judgment for $966 was reduced upon the appeal therefrom to the sum of $328.

It is alleged in the amended petition for the writ which we are now considering that the petitioner, upon notice of reduction of the said judgment to the lesser sum, offered to return the deed of trust to Myra Johnson, and did in fact return and deliver said deed of trust to the liquidator of the Indemnity Corporation, but that he was unable to pay or return to said liquidator any part of the money received by him for the reason that he was without property or funds. The liquidator then demanded from petitioner a redelivery to him of the note and trust deed, properly assigned, together with the sum of $225.93, which represented the net balance remaining in petitioner's hands after deducting $296.80 (the net amount of the reduced judgment), from the amount realized on the certificate of deposit, which was $522.73.

In response to petition and order to show cause in re contempt, petitioner here filed an affidavit in which he stated that he had used the money received from the certificate of deposit for living expenses; that he had offered to Myra Johnson the deed of trust and note, but that acceptance thereof had been refused by said Myra Johnson, and that "affiant-respondent does hereby tender to this Court the said Deed of Trust and said Note."

Upon hearing of the contempt matter, the court made its order committing petitioner for contempt, which order provided, among other things, as follows:

"Whereas, said James A. Johnson, at said hearing on the 29th day of April, 1935, tendered into Court said deed of trust, but failed and neglected and refused to return said note or said sum of $225.93, or any part thereof; * * *

"Whereas, said James A. Johnson has repeatedly and consistently neglected and refused to return or deliver to the said Liquidator of said Benjamin Franklin Bond and Indemnity Corporation the said $225.93 and said promissory note, or either of them, or any part thereof,

"Now, Therefore, It Is Ordered, Adjudged and Decreed:

"That said James A. Johnson is guilty of the contempt of the Order of the above entitled Court, as aforesaid, and is adjudged by the undersigned to pay a fine of $250.00 or, in lieu of payment thereof, be remanded to and imprisoned in the County Jail of the County of Los Angeles for the period of one day for each Two Dollars ($2.00) of said fine that shall remain unpaid, and that said James A. Johnson be forthwith committed to the custody of the Sheriff of the County of Los Angeles until he complies with the judgment of this court."

Petitioner contends that, upon reduction of said $966 judgment to $328, he became indebted to Myra Johnson named in said order, in the sum of $225.93, which was and is a civil debt, and that he is being imprisoned and held because of his inability to pay said debt, in violation of section 15, article I, of the California Constitution, and in violation of subsections 1, 4, and 7, section 1487, of the Penal Code. He also points out that the money was delivered to him under court order of February 25, 1934, and demand for its return was not made by the liquidator until March 1, 1935, or more than one year after its delivery to petitioner.

[1] In order to constitute contempt, it is essential that the thing ordered to be done be within the power of the person to perform. 5 Cal. Jur. 913. The statement of petitioner that he is without funds with which to pay the $225.93 remains uncontroverted in the record.

[2] This proceeding is an attempt on the part of the court to collect by means of a proceeding in re contempt an amount of money which is undoubtedly due to a judgment debtor by reason of an overpayment made to a judgment creditor by the liquidator, acting under the orders of the court, such payment having been made out of property and funds deposited by said judgment debtor with the corporation in liquidation, solely as security to indemnify such corporation from any possible liability under a stay bond on appeal filed in the original divorce action, as hereinbefore set forth. So far as the record shows, the liquidator and the corporation in liquidation have no other interest in the property ordered to be turned over, than as above stated, and there is nothing to show that there is any liability on the part of the corporation in liquidation on account of the stay bond in question. This being so, it was not within the province of the court to make the order in this proceeding adjudging petitioner James A. Johnson guilty of contempt in failing to pay over and deliver to the liquidator the property, referred to in the order which is under attack here.

The petitioner is ordered discharged.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.

9 Cal.App.2d 499

CHRISTY v. CITY OF ALHAMBRA.

Civ. 9988.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1935.

Hearing Denied by Supreme Court Dec. 12, 1935.

1. Municipal corporations ⇨791(2)

Constructive notice of defective condition of public works will be presumed where defective condition is conspicuous and has existed for considerable length of time, as regards liability of municipality for injuries resulting from such defective condition (St. 1923, p. 675, § 2).

2. Municipal corporations ⇨757(1), 795, 817(1)

Municipality must keep its meter boxes in repair and must inspect them at reasonable intervals, and, if meter readers are not charged with duty of inspection, it will be presumed that some other employee is, and that municipality did not allow boxes to go uninspected for period of a year (St. 1923, p. 675, § 2).

3. Municipal corporations ⚷791(1)

Whether municipality had constructive notice of defective condition of public works depends upon whether, in exercise of reasonable diligence, defective condition should have been discovered within reasonable time (St. 1923, p. 675, § 2).

4. Municipal corporations ⚷819(6)

In action against city for injuries sustained in stepping into sunken water-meter box which was in defective condition, evidence that box had been in defective condition for a year prior to accident and that such condition would have been disclosed upon inspection *held* sufficient to show notice to city of defective condition of box (St. 1923, p. 675, § 2).

5. Municipal corporations ⚷806(3)

Occupant of automobile, who stepped into defective sunken water-meter box in parkway between curb and sidewalk when she alighted from automobile, was not contributorily negligent, as respects her right to recover from city for injuries, where cover on box was in place and there were no circumstances to warn occupant of unsafe condition of box (St. 1923, p. 675, § 2).

6. Municipal corporations ⚷818(6)

In action against city for injuries sustained in stepping into sunken water-meter box which was in defective condition, testimony of witness, who had stepped into same meter box four months previously, which tended to corroborate testimony of other witnesses that hinges were broken so as to detach lid from box, was relevant as to question of condition of box some months before plaintiff's accident (St. 1923, p. 675, § 2).

7. Damages ⚷216(8)

Instruction that plaintiff could recover past and future losses arising out of her inability to engage in her business as result of her injuries and such future damages as would be direct effect of injuries was too broad, and damages should have been limited to those suffered in past and to such future damages as were established with certainty (Civ. Code, § 3283).

8. Appeal and error ⚷882(12)

Erroneous damage instruction for plaintiff in personal injury action *held* not reversible error, where damage instruction requested by defendant was even more erroneous.

9. Appeal and error ⚷882(12)

Litigant cannot complain of error in instruction given at his request.

10. Damages ⚷132(1)

$3,500 to woman who was in bed for three weeks under physician's care after accident in which she fell on her back, who suffered extreme pain for three days and lesser degree of pain for six months after accident up to time of trial, who had permanent arthritic condition of her back and was unable to earn anything after accident, and who had earned $4,200 and $3,600 during two of years preceding accident, *held* not excessive.

11. Appeal and error ⚷1004(1)

Award of damages, which is not so grossly disproportionate to just compensation as to raise presumption that it was given as result of passion, prejudice, or corruption, will not be set aside as excessive.

◆

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by L. M. Christy against the City of Alhambra, a municipal corporation. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

James B. Ogg, of Alhambra, for appellant.

Clark & Morgan, of Alhambra, for respondent.

SHINN, Justice pro tem.

Plaintiff and respondent, L. M. Christy, in alighting from an automobile in the city of Alhambra stepped into a sunken water-meter box in the parkway between the curb and sidewalk, which box and meter were maintained and controlled by appellant, city of Alhambra. In a suit for damages, charging the city with negligence in maintaining the box and cover thereof in a defective condition, she was awarded $3,500 by a jury. Upon its appeal, the city relies upon the insufficiency of the evidence to show notice to the city of the defective condition of the meter box, upon the defense of contributory negligence, alleged errors in the admission of evidence and instructions to the jury, and contends that the amount of the verdict is excessive. The box in question was square, of metal construction with a metal top, which folded back upon hinges, to allow reading of the meter. It had been in use a long time and there was evidence that it had been in a defective condition, due to the hinges being broken, for about a year prior to the accident. Shortly after the accident it was replaced with another box, the old box being discarded. The water meters were read by the city each month.

[1-4] Appellant relies upon the fact that no actual knowledge of the defective condition of the box was brought home to the city water department, and that therefore the liability of the city for negligence was not established. The argument, however, ignores the element of constructive notice, which will be presumed where a conspicuous defect or dangerous condition has existed for a considerable length of time. Under Statutes of 1923, page 675, a municipality is chargeable with actionable negligence if it has notice of the dangerous or defective condition of public works and fails within a reasonable time thereafter to remedy the same, so as to protect the public against injury (section 2). It was the duty of the city to keep its meter boxes in repair, which duty entailed an obligation to inspect them at reasonable intervals. If the meter readers were not charged with the duty of inspection, it is to be presumed that some other employee was and that the city did not allow the boxes to go uninspected for a period of a year. "Implied or constructive notice arises from facts from which it may be reasonably inferred or from proof of circumstances from which it appears that the defect ought to have been known or remedied, the rule prevailing in such cases requiring the exercise of ordinary or reasonable care to discover the defect." 43 C. J. 1045. This rule is given recognition in Wurzburger v. Nellis, 165 Cal. 48, 130 P. 1052; Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424; and Roberts v. Pacific Gas & Electric Co., 102 Cal. App. 422, 283 P. 353. We take the question to be, in each case, whether, by the use of reasonable diligence, the given condition should have been discovered within a given period of time, and the answer must depend upon the facts of the particular case. The broken condition of the meter box would have been disclosed upon inspection and the jury not unreasonably concluded that such a condition should have come to the attention of the city authorities within the period of a year. A contrary conclusion, it seems to us, would not have been as well founded. The evidence therefore sufficiently shows notice on the part of the city.

[5] Appellant's argument upon the defense of contributory negligence does not advance any plausible reason for holding, as a matter of fact, and much less as a matter of law, that plaintiff was negligent in stepping onto the meter-box cover as she alighted from the car. There was evidence that the cover was in place and no evidence of any circumstances to warn her of its unsafe condition. There is no reason for disturbing the conclusion of the jury as to the merits of this defense.

[6] Appellant next claims error in allowing the witness Winifred Pearson to testify that some four months before plaintiff's accident the witness stepped into the same meter box when alighting from an automobile in the nighttime. The evidence tended to corroborate that of other witnesses who testified that the hinges were broken so as to detach the lid from the box, and we think the testimony was relevant to the question of the condition of the box some months before plaintiff's accident. Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; 10 Cal. Jur. 827; Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083.

[7-9] The court instructed the jury that plaintiff might recover "the loss, if any, which plaintiff has sustained or will hereafter sustain, by reason of abatement of ability to follow business pursuits, by injuries received, * * * the time she has lost from her business by reason of such injury and such damages, if any, as you believe, from the evidence, she will sustain in the future as the direct effect of the injury she received, etc." The language of the instruction was much too broad. The damages should have been limited to those suffered in the past and to such future damages as were established with certainty. Section 3283, Civ. Code; Melone v. Sierra R. Co., 151 Cal. 113, 91 P. 522. However, defendant's own instruction on the subject was even more erroneous. Under it the jury was told that plaintiff could recover not for injuries which she "will" sustain, as in plaintiff's instruction, but for those which she "may" sustain. This error in the instruction does not justify a reversal of the judgment. Presumably defendant's instruction would have been given if plaintiff's had not been. A party cannot complain of error in an instruction given at his own request. The amount of damages awarded plaintiff is not sufficiently large to indicate that this misdirection of the jury, at the request of both parties, had a material effect upon the size of the verdict.

[10, 11] The final point to be considered is the alleged excessive damages. Plain-

tiff at the time of the injury weighed 218 pounds. She fell upon her back, was taken home, and remained in bed for three weeks under a doctor's care. She was suffering from an arthritic condition of the spine. There was testimony to the effect that for the first three days she suffered extreme pain, and there was other evidence to the effect that the pain continued in a lesser degree up to the time of the trial, six months after the accident. She was employed as manager of a cosmetic company, instructing and training operators and traveling about, putting in managers, and checking the work of the operators. This work covered the territory in California from Fresno south. She testified that after the accident she was unable to take long drives and had not been able to earn anything by her personal efforts up to the time of the trial. Her testimony as to her previous earnings was of a very general nature, but to the effect that she had made $4,200 or more in 1932 and $3,600 in 1933. The evidence, as a whole, shows that plaintiff's injuries were of a substantial nature. The arthritic condition of her back was shown to be a permanent one, and we think the jury might reasonably have believed not only that the injuries themselves caused plaintiff severe pain for an extended period of time, but that they also aggravated an existing condition, so as to materially restrict plaintiff's activities in her business and increase the pain and inconvenience which will result from a physical condition which, in plaintiff's case, appears to be a somewhat serious one. The most that can be said of the verdict, in any view, is that the award was perhaps a generous one. Even if that were our view, as to which no expression is called for, we would not be at all justified in granting a new trial or in reducing the amount of the judgment. The award is not so grossly disproportionate to just compensation as to raise a presumption that it was given as the result of passion, prejudice or corruption. Therefore, under authorities so numerous and uniform as to require no citation or discussion, the verdict cannot be set aside as excessive. 8 Cal. Jur. 834.

Other minor points relating to the admission of evidence and further criticism of instructions in unimportant particulars require no discussion.

The negligence of the defendant was established by substantial evidence, the case was tried without error which might reasonably have led to an erroneous judgment, and the result of the case, upon the entire record, appears to be a fair one.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

In re KENT'S ESTATE.*

CALIFORNIA TRUST CO. v. CASSIDY et al.

Civ. 10595.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1935.

Hearing Granted by Supreme Court Dec. 16, 1935.

1. Judges 🔑15(1)

Purpose of constitutional amendment creating judicial council was to expedite judicial business (Const. art. 6, § 1a).

2. Judges 🔑14

Program of judicial council to make state judicial machinery more elastic and efficient must be interpreted broadly and applied liberally (Const. art. 6, § 1a).

3. Judges 🔑16(1)

Nonappearing heirs, legatees, and creditors are not "parties" to probate proceeding, and are not "parties litigant" within constitutional provision that cause in superior court can be tried by judge pro tempore upon stipulation of "parties litigant" (Const. art. 6, § 5, as amended in 1928).

[Ed. Note.—For other definitions of "Party," see Words & Phrases.]

4. Constitutional law 🔑15

In interpreting constitutional provision, each word must be given some value.

5. Judges 🔑16(1)

Under constitutional provision that cause in superior court can be tried by judge pro tempore upon stipulation of "parties litigant," "parties litigant" means parties who are taking part in litigation and have appeared therein (Const. art. 6, § 5, as amended in 1928).

Term "parties litigant" means the antagonistic sides of a controversy. A "litigant" is a party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones.

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*For subsequent opinion see 57 P.2d 901.

6. Stipulations 🔑17(2)

Active parties to litigation can bind passive parties by stipulation.

7. Judgment 🔑477

Judgments and orders of superior court with judge pro tempore presiding are entitled to same presumption of regularity as are judgments and orders of superior court with regular judge presiding, notwithstanding that judge pro tempore is selected under stipulation of parties litigant by approval and order of a regular judge, since judge pro tempore acts for superior court (Code Civ. Proc. § 259a; Const. art. 6, § 5, as amended in 1928).

8. Judges 🔑16(1)

Failure of record in probate proceedings to show that certain heirs or litigants stipulated in writing or orally to selection of judge pro tempore does not destroy presumption of regularity of proceedings in absence of showing that such heirs or litigants did not stipulate, and failure of heirs and litigants to appear would be assumed to be "stipulation" within constitutional provision that cause in superior court can be tried by judge pro tempore upon "stipulation" of parties litigant (Code Civ. Proc. § 259a; art. 6, § 5, as amended in 1928).

[Ed. Note.—For other definitions of "Stipulate; Stipulation," see Words & Phrases.]

9. Evidence 🔑82

Special judges are presumed to have been properly selected.

10. Judges 🔑16(1)

Under constitutional provision that cause in superior court can be tried by judge pro tempore upon stipulation of parties litigant, written stipulation is not required, and stipulation made in open court will be presumed when required for regularity of order in absence of contrary showing affirmatively presented on record (Const. art. 6, § 5, as amended in 1928).

11. Executors and administrators 🔑513(9)

In probate proceeding for allowance of executrix' final account, failure of certain heirs and legatees to appear would be considered as a consenting that accounting could be settled.

12. Executors and administrators 🔑510(11)

District Court of Appeal cannot set aside implied finding of probate department of superior court in proceeding for allowance of executrix' final account where there is substantial evidence in record to support finding.

13. Evidence 🔑11

District Court of Appeal will take judicial notice that period during which executrix held office was period of general depression with consequent declining prices.

14. Evidence 🔑11

It is common knowledge that executors and administrators of estates in Los Angeles during period of general depression in which prices were declining held on to stocks of estate after consulting various financial advisers and stock and bond men with reference to selling stock.

15. Executors and administrators 🔑506(3)

In proceeding to surcharge executor with shrinkage in market values of stock belonging to estate, evidence that executrix who held office during period of general depression and declining prices consulted financial advisers and stock and bond men with reference to selling stock, that she was alert and diligent, that it was her best judgment to hold on to stocks, and that she acted in same manner with respect to her own stocks, *held* to support finding that executrix was not negligent in not disposing of stock within three months of her appointment.

◆

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge pro tem.

In the matter of the estate of Louise M. Kent, deceased. The California Trust Company, as administrator with the will annexed of the last will and testament of Louise M. Kent, deceased, filed its contest to the final account of Alice Cassidy, as executrix (now removed) of the last will and testament of Louise M. Kent, deceased. From an order, the administrator appeals, Jennie Cassidy Tetley, legatee, and the Massachusetts Bonding & Insurance Company, as well as removed executrix, being the respondents.

Order affirmed.

Chas. E. R. Fulcher, of Los Angeles, for appellant.

Russell D. Hardy, of Los Angeles, amicus curiæ.

Joe Crider, Jr., and A. F. Mack, Jr., both of Los Angeles, for respondent.

Ralph G. Lindstrom and Betty Marshall Graydon, both of Los Angeles, amici curiæ.

CRAIL, Presiding Justice.

Louise M. Kent, deceased, left an estate consisting of securities appraised at $14,239.38. By her will she bequeathed a total of $8,500 in cash to a number of legatees named therein. The residue was not disposed of by the instrument and went by operation of law to her heirs. Alice Cassidy was appointed executrix on April 20, 1931. On May 14, 1934, she was removed by order of court; and the trust company, objector, was appointed administrator with the will annexed. After her removal, Alice Cassidy filed her final account, to which objector (appellant) filed its contest, asserting several grounds for surcharging the account of the removed executrix. When the final account of the removed executrix came on for hearing after due notice to the world, all persons who had appeared in the proceeding stipulated in writing that the cause might be heard by Florence M. Bischoff as judge pro tempore. Miss Bischoff is a member of the bar and one of the three commissioners regularly presiding in the probate department of the superior court of Los Angeles county. She hears the uncontested or routine calendars as commissioner under section 259a of the Code of Civil Procedure. She hears contested matters when and only when all parties who have appeared in the proceeding consent in writing to her appointment as judge pro tempore. Her selection in the instant case was approved and ordered by the court in which the cause was pending. The court, Judge Bischoff presiding, after hearing the case, found against the removed executrix on all contested items except on one item for damages for alleged negligence for failing to sell listed stock of the estate within a reasonable time, and found in favor of the removed executrix on this charge of negligence. It is from this latter part of the order that the appeal is taken.

One of the contentions raised on this appeal is a jurisdictional one, and for that reason should be considered first. The contention is made that the order is void because Miss Bischoff was not duly authorized by stipulation of the parties to act as judge pro tempore. To state the contention in greater detail, it is said that she derived her power to act purely from a stipulation entered into between the attorneys for those who appeared in the estate and no others, and that the heirs at law, the devisees under the will and the creditors of the estate, all of whom were parties in interest but had not appeared, did not stipulate in writing or otherwise or at all that Florence M. Bischoff should act as judge pro tempore.

The court's jurisdiction to make the order which is appealed from, or its lack of jurisdiction, must be tested by the provisions of section 5, article 6, of the Constitution as amended in 1928, which reads as follows: "Upon stipulation of the parties litigant or their attorneys of record a cause in the superior court * * * may be tried by a judge pro tempore who must be a member of the bar sworn to try the cause, and who shall be empowered to act in such capacity in the cause tried before him until the final determination thereof. The selection of such judge pro tempore shall be subject to the approval and order of the court in which said cause is pending and shall also be subject to such regulations and orders as may be prescribed by the judicial council."

The question is one of great importance to the administration of justice in California. The amendment to the Constitution above quoted is a part of the program presented by the judicial council with the aim in view of giving to the judicial machinery of the state greater elasticity and efficiency. As a part of the same program, the Legislature, at its first session after the constitutional amendment of 1928 was adopted, enacted section 259a of the Code of Civil Procedure, which reads in part as follows: "Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall * * * have power: * * * 4. To act as judge pro tempore when otherwise qualified so to act and when appointed for that purpose; provided, that while acting as such he shall receive no compensation therefor other than his compensation as commissioner; * * * 6. (Uncontested actions.) When ordered by the court appointing him so to do, to hear, report on and determine all uncontested actions and proceedings other than actions for divorce, maintenance or annulment of marriage."

[1, 2] The creation of the judicial council by the amendment of 1926 (Constitution of California, art. 6, § 1a) was itself the outstanding development of a program which was adopted in response to the outcry against the delays and technical hindrances which the business man and the ordinary citizen alike found distasteful, and to offset the demands of chambers of com-

merce and other associations for extra-judicial methods of settling controversies such as by arbitration, and was in general to expedite judicial business. See Fay v. District Court, 200 Cal. 522, 254 P. 896. This program must be interpreted broadly and applied liberally if it is to succeed, with the proper safeguards certainly, but along the lines conducive to efficiency and vigor. Proper safeguards, so far as judges pro tempore are concerned, were provided for in the amendment itself, which says: "The selection of such judge pro tempore shall be subject to the approval and order of the court in which said cause is pending and shall also be subject to such regulations and orders as may be prescribed by the judicial council." Const. art. 6, § 5, as amended in 1928.

The largest single use of judges pro tempore in Los Angeles county is in the probate department, where the three commissioners are accustomed to act as such, often in several proceedings each day. These commissioners, for days which have lengthened into months and now into years, have presided in the probate department as judges pro tempore. Their expertness in probate law and procedure is so well recognized, their judicial work so efficient, and the practice so satisfactory to all concerned, that these commissioners might well deserve the title of assistant judges. To a remarkable degree the result has been in consonance with the aims of the program for the expedition of judicial business. The increasing efficiency and capacity of that department of the superior court (see Fifth Report of the Judicial Council, 1934, p. 5) are due in large measure to the use of this constitutional provision in the manner disclosed in the record herein. This practice and procedure has been going on for years without harm or injury to any party in interest and never has it been frowned upon except possibly in the case of Toby v. Superior Court (Cal. App.) 47 P.(2d) 338, concerning which we will speak later. On the contrary, it has received almost universal approbation. Also the master calendar department of the Los Angeles county superior court has been for three years developing the use of judges pro tempore in ordinary civil litigation and using them when congestions arise, and this department's remarkable record of achievement (see Fifth Report of the Judicial Council, 1934) is due in large part to such use of judges pro tempore.

It will be remembered that in probate proceedings the heirs, legatees, and creditors may be scattered to the four corners of the earth. Frequently their residences are unknown. Who the heirs and legatees actually are is not ordinarily determined in a probate proceeding until the final order of distribution. Rarely, although occasionally, the determination is made in advance of that order on a petition to determine heirship. If it is necessary for nonappearing heirs and devisees and creditors to join in such stipulations, then it is an impossibility. No such stipulations may be obtained. Furthermore, if such nonappearing heirs and devisees and creditors are parties to the proceeding and must join in stipulations before they are effective, then no stipulation in any probate proceeding may be entered into, not even with regard to the introduction of evidence or the conduct of the trial.

A decision that the order appealed from is void because of the failure to get such a stipulation from the nonappearing heirs and legatees and creditors will not only terminate this practice of appointing judges pro tempore, but will make void hundreds, possibly thousands, of orders which have been signed by such judges pro tempore, and unsettle the titles to vast amounts of real property in Los Angeles county. A decision sustaining the order will not only save the practice and save the titles to property, but will make it possible for the superior courts to expand their man power in case of temporary congestion and to decrease their man power when the emergency passes. The decision of the question is therefore an important one.

Who are parties in a probate proceeding? More than thirty years ago in the Estate of McDougald, 143 Cal. 476, 77 P. 443, 444, the Supreme Court of this state declared the law on the question, who are parties in a probate proceeding, in a well-reasoned opinion in which that question was the only question before the court, and the law so declared has been accepted and followed by the superior court of Los Angeles county and other counties from that day to this. That law has become a rule of property, followed alike by the title companies and all others interested in the vast amount of property which passes through the probate department of that court each year. In the McDougald Case, supra, the trial court had made an order settling a final account.

From this order an appeal was taken, but no notice of appeal was served on the creditors who had not appeared, and the respondent moved to dismiss the appeal for the failure to serve such persons, on the theory that all of said persons were directly interested in the result, and hence were parties to the proceeding. We quote rather fully from the opinion: "If these contentions prevail, it is obvious that difficulties will arise in many cases. If a nonappearing creditor is an adverse party, so also would be a nonappearing heir or legatee. * * * The word 'party' should not be given so broad a meaning. That a person interested in an estate, although his name and his interest are disclosed on the face of the record, is not necessarily a party to the cause or proceeding, is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. In a proceeding to probate a will, any person interested, whether as devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. So, with the petition for administration, there may be many persons who are entitled to letters, and who are interested in the matter of the appointment. But if they fail to appear or contest the right of the petitioner, it is manifest that they cannot be considered parties. Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and, as such, has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account, or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding. The only effect of such a notice, so far as this question is concerned, is to give them an opportunity to become parties, so that, if they desire, they may appear and make themselves parties in some appropriate manner. Unless they do so appear, they are to be considered as having no objections to the account as rendered, and as consenting [stipulating] that it may be settled accordingly. If thereupon other interested persons do appear, and by virtue of a contest secure a decision which inures to the benefit of those persons who do not appear, this does not make the nonappearing persons parties to the contest, notwithstanding their failure to appear, so that it becomes necessary to serve upon them notice of an appeal from the order made upon the contest." The court's position is supported by citations therein from numerous decisions, including In re Ryer's Estate, 110 Cal. 556, 558, 42 P. 1082; In re Calkins' Estate, 112 Cal. 296, 297, 44 P. 577; In re Bullard's Estate, 114 Cal. 462, 46 P. 297; and other cases. See, also, In re Carpenter's Estate, 146 Cal. 661, 80 P. 1072. This also is the rule throughout the nation. In all but a few of the probate cases when the question is raised it is held that the several persons having an interest in the subject-matter of the action, who do not appear, are not parties. See cases collected in 88 A. L. R. 442.

This law was stated again in almost the same language in McKenzie v. Hill, 9 Cal. App. 78, 98 P. 55, 56, as follows: "In a proceeding to probate a will any person interested, whether as devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. * * * Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and as such has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding."

Affording some indication of the common understanding of the above law as it applies to judges pro tempore, it may be noted, though not suggested as more than of persuasive force, that the jurisdiction of courts presided over by judges pro tempore under similar circumstances has been assumed and taken for granted both by the courts and the litigants in each and all of the cases which have come up on appeal except the Toby Case, supra. For illustration, see In re Estate of Price, 138 Cal. App. 462, 32 P.(2d) 994; In re Estate of Rozen-Goldenberg, 1 Cal. App. (2d) 631, 37 P.(2d) 132; In re Estate of Price, 136 Cal. App. 257, 28 P.(2d) 717; In re Estate of Giambastiani, 1 Cal. App. (2d) 639, 37 P.(2d) 142; In re Estate of Mahn, 2 Cal. App. (2d) 111, 37 P.(2d) 478.

[3-5] All of the above has been stated in support of our decision that nonappearing heirs and legatees and creditors are not parties to a probate proceeding. It is even more obvious that they are not "parties litigant." Under the customary rules of constitutional interpretation, each word should be given some value. In the constitutional provision the word "litigant" qualifies the word "parties," and the two words must be given some value beyond the one word "parties." Obviously the phrase "parties litigant" means the parties who are taking part in the litigation—those who have appeared therein. There are many causes at law and in equity where the rights of parties are determined, although the parties themselves do not conduct the litigation. These actions, where contested, proceed under the direction of parties to the controversy who have appeared—who are "parties litigant." At the same time the proceeding determines the rights of other parties in interest but not litigant. Among such cases are receiverships, representative suits, actions by and against trustees, and, assuming that nonappearing heirs and devisees and creditors are parties, then the several proceedings in probate.

[6] "Parties litigant, a term which has been construed to mean the antagonistic sides of a controversy." 47 Cor. Jur. 246. "Litigant. A party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones." Black's Law Dictionary. Webster gives "litigant" the same meaning as "one engaged in a law suit; as, parties litigant." Courts in other jurisdictions have upheld the authority of special judges to act upon the agreement of the active parties to the litigation, although other persons' interests may be affected. Landrum v. Chamberlin, 73 Ga. 727; Pottlitzer v. Citizens' Trust Co., 60 Ind. App. 45, 108 N. E. 36; Jensen v. Angelus B. & M. Co., 87 Wash. 392, 151 P. 825. In Ernest v. Canary, 139 Okl. 128, 281 P. 574, a probate proceeding tried by a special judge was held to be valid. Active parties to the litigation may bind passive parties by stipulation. State ex rel. Brookfield Co. v. Mart, 135 Or. 603, 283 P. 23, 295 P. 459; Zeitinger v. Hargadine-McKittrick Dry Goods Co., 309 Mo. 433, 274 S. W. 789.

[7-11] While a judge pro tempore is selected under the stipulation of the parties litigant by the approval and order of a "regular" judge, still, when acting, the judge pro tempore is acting for the superior court. The judgments and orders of the superior court, a judge pro tempore presiding, are entitled to the same presumption of regularity as a court with a regular judge presiding. Consequently the failure of the record herein to show that certain heirs or litigants stipulated in writing or orally to the selection of the judge pro tempore, in the absence of any showing in the record that they did not stipulate, is ineffective to refute the presumption of the regularity of the proceedings. Special judges are presumed to have been properly selected. In re Corralitos Cooperative Co., 130 Cal. 570, 62 P. 1076; People v. Ah Lee Doon, 97 Cal. 171, at page 177, 31 P. 933, citing Code Civ. Proc., sec. 1963; In re Newman's Estate, 75 Cal. 213, 221, 16 P. 887, 7 Am. St. Rep. 146; People v. Mellon, 40 Cal. 648, 655. This is the general rule. 33 Cor. Jur., §§ 235, 236, p. 1026; State v. Sachs, 3 Wash. 691, 29 P. 446. The constitutional provision authorizing judges pro tempore does not require a written stipulation. Stipulations made in open court when required for the regularity of an order are presumed, in the absence of a contrary showing affirmatively presented on the record. Leadbetter v. Lake, 118 Cal. 515, 50 P. 686; Mulcahy v. Glazier, 51 Cal. 626. Under the authority of the McDougald Case, supra, the failure of heirs and legatees to appear will be considered "as consenting" that the account may be settled. This consent may as easily be assumed to be a stipulation within the intendment of the constitutional provision.

With regard to the Toby Case (Cal. App.) 47 P.(2d) 338, the opinion in that case speaks of "parties in interest," but fails to mention or consider who are "parties litigant," which is the classification designated in the Constitution even as quoted in that opinion. It overlooks the McDougald Case, although its effect is to overrule that case and the line of cases which have followed it.

[12-15] Upon the merits of the case, it is the contention of appellant that the executrix should have sold certain stocks belonging to the estate within a reasonable time after her appointment, and that three months under the circumstances of this case would be a reasonable time for the sale thereof, and that because of her negligence in failing to dispose of the stocks within said time the estate and the heirs have suffered a loss from shrinkage in market values for which they should be compensated. As already stated, the court found against the objector on this question of fact, and this court, on appeal, cannot set aside the implied finding that the executrix was not negligent in this matter if there be in the record any substantial evidence to support the finding. The evidence shows that the executrix was appointed and continued to hold office in a period when the market value of the stocks in question was steadily declining from month to month with the exception of an occasional small upward flurry. This court will also take judicial notice of the fact that the period involved was a period of general depression with consequent declining prices. The testimony of the executrix relative to her dealing with the stocks shows that she consulted various financial advisers and stock and bond men and others from time to time with reference to selling the stocks; it tends to show that she was alert and diligent and that it was her own best judgment to hold on to the stocks; and that she acted in the same manner with respect to several investments of her own. This court cannot take the part of an ostrich and bury its head in the sand. The judges of this court know from common knowledge and one of them from actual knowledge that practically all of the executors and administrators of estates pending in Los Angeles county during that period acted in the same general way, exercising the same degree of prudence, or lack of it, as did this executrix. We are satisfied that there is some substantial evidence to support the implied finding.

Mr. Justice WALTON J. WOOD, having signed the order appointing Miss Bischoff judge pro tempore, feels himself disqualified to act in this case and has taken no part in the decision. Mr. Justice GAVIN CRAIG is disqualified and absent. The court, during the decision of this case, was composed of the undersigned.

Order affirmed.

We concur: GOULD, Justice pro tem.; McCOMB, Justice pro tem.

9 Cal.App.2d 427

BARNS v. BARNS.

Civ. 9646.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1935.

1. Constitutional law 🔑110

Wife's right to accrued alimony under New York judgments was a "vested right," and judgments were to that extent enforceable as any other final judgment entitled to protection of full faith and credit clause of Federal Constitution (Const. U. S. art. 4, § 1).

[Ed. Note.—For other definitions of "Vested Right," see Words & Phrases.]

2. Divorce 🔑331

New York judgments with respect to future installments of alimony *held* required to be treated as final judgments by courts of other states until modified in New York (Const. U. S. art. 4, § 1).

◆

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Virginia Kift Barns against Frederick Balston Barns. From all of the judgment except that part awarding plaintiff counsel fees, plaintiff appeals.

Portions of judgment appealed from reversed, with directions.

Prior opinion, 44 P.(2d) 579.

Theodore M. Monell, of San Francisco, for appellant.

Frank V. Campbell and L. H. Schellbach, both of San Jose, for respondent.

SPENCE, Justice.

Plaintiff is the wife of defendant and she previously brought an action in the state of New York to obtain a decree of separation from defendant. Plaintiff prevailed in the New York action and judgment was entered in November, 1932. It provided, among other things, "that defendant pay to the plaintiff the sum of Twenty-Five ($25.00) Dollars per week, as permanent alimony, from the date of the judgment herein for the support and maintenance of said plaintiff during her natural life. That in case any event shall occur, materially changing the circumstances or conditions of the said parties, or either of them, an application may be made, on the foot of this judgment, by any party in interest, for such modification or annulment of the provisions of this judgment touching the said allowance for support, as may be just." It was further decreed "that the defendant pay to the plaintiff the sum of Six hundred and twenty-five dollars ($625.) the amount of the unpaid temporary alimony at the rate of Twenty-five ($25.) dollars per week from the 1st day of June, 1932, to the 23rd day of November, 1932, and also the sum of Two hundred and fifty ($250.) Dollars as the unpaid counsel fees and the sum of $146.05 costs and disbursements as taxed, making in all the sum of $1021.05 and the said plaintiff have execution therefor." In June of 1933, pursuant to the practice in the state of New York, said plaintiff obtained another judgment in the New York action in the sum of $725 for the accrued and unpaid alimony from November 23, 1932, to June 14, 1933. No appeal was taken from either of said judgments nor had said judgments ever been modified in any manner.

Thereafter plaintiff brought the present action to enforce said judgments in this state. Her complaint was in two counts. The judgment first above mentioned was the basis of the first count and the judgment second above mentioned was the basis of the second count. The prayer of the complaint was for a money judgment in the sum of $1,746.05 with interest. It will be noted that said sum was the total amount calculated by adding the sum of $1,021.45 mentioned in the first judgment and the sum of $725 mentioned in the second judgment. The answer of defendant made certain denials and set up certain alleged affirmative defenses for the purpose of seeking a modification or annulment of said judgments. A motion was also made for that purpose, which motion was heard at the time of the trial. The cause was tried by the court sitting without a jury and the trial court found that plaintiff had obtained the judgments as alleged and that no part of said judgments had been paid, but it denied any recovery to plaintiff except for the sum of $396.05, together with interest, being the amount allowed by the New York court for counsel fees and costs. The trial court also made certain findings with respect to the facts alleged by defendant in seeking a modification or annulment of the New York judgments, and included in its judgment the following provisions: "It is ordered, adjudged and decreed that all orders and judgments for the payment of Twenty-five ($25.00) Dollars per week as temporary and/or permanent alimony, made by the Supreme Court of the State of New York, in and for the County of New York, in an action entitled 'Virginia Kift Barns, Plaintiff, vs. Frederick Balson Barns, Defendant,' numbered 7833, in said Supreme Court of the State of New York, in and for the County of New York, be and the same are hereby annulled as to all instalments accrued thereunder, and as to all future instalments; and the order of said Supreme Court of the State of New York, in and for the County of New York, made on the 23rd day of November, 1932, is hereby annulled except as to the provisions therein for the payment of counsel fees and costs; and the order or judgment of June 21st, 1933, made by said Supreme Court of the State of New York, in and for the County of New York, in said action, is hereby annulled." Plaintiff appeals from all of the portions of said judgment except that portion awarding her the amount specified for counsel fees and costs in the New York judgment of November, 1932.

[1, 2] Appellant contends that the trial court erred in annulling the judgments of the New York court and in failing to enter judgment in favor of appellant. There can be no question about the soundness of appellant's contention in so far as accrued alimony is concerned. The right to the accrued alimony under the New York judgments was a vested right, and said judgments were to that extent enforceable as any other final judgment entitled to the protection of the full faith and credit clause of the Federal Constitution. Article 4, § 1, Constitution of the United States; Bruton v. Tearle, 117 Cal. App. 696, 4 P.(2d) 623; Cummings v. Cummings, 97 Cal. App. 144, 275 P. 245; Rinkenberger v. Rinkenberger, 99 Cal. App, 45. 277 P. 1096; Creager v. Superior Court, 126 Cal.

App. 280, 14 P.(2d) 552; Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; Harris v. Harris, 259 N. Y. 334, 182 N. E. 7; Krauss v. Krauss, 127 App. Div. 740, 111 N. Y. S. 788; Brice v. Brice, 225 App. Div. 453, 233 N. Y. S. 366; Van Horn v. Van Horn, 196 App. Div. 472, 188 N. Y. S. 98; McPartland v. McPartland, 146 Misc. 672, 261 N. Y. S. 844. We are also of the opinion that appellant's contention that the trial court erred in annulling the New York judgment with respect to future installments must be sustained. The authorities clearly indicate that such judgment should be treated as final by the courts of other states until modified in the state of its origin. Little v. Little, 146 Misc. 231, 262 N. Y. S. 654, 655; Van Horn v. Van Horn, supra; Goldberg v. Mayer, 243 App. Div. 477, 277 N. Y. S. 799; Paulin v. Paulin, 195 Ill. App. 350; Levine v. Levine, 95 Or. 94, 187 P. 609; Trowbridge v. Spinning, 23 Wash. 48, 62 P. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; Holton v. Holton, 153 Minn. 346, 190 N. W. 542, 41 A. L. R. 1415; Matson v. Matson, 186 Iowa, 607, 173 N. W. 127. In Paulin v. Paulin, supra, the court said, 195 Ill. App. 350, at page 352: "True it is that every decree for alimony is subject to be varied at a subsequent time by the court entering the decree yet no other court can disturb it, and until such court does so, it remains fast, firm, and final." In Levine v. Levine the court said, 95 Or. 94, 187 P. 609, at page 615: "But until the decree is modified in the state of its origin it is to be treated as a final judgment."

The confusion which would result from the adoption of any other rule is suggested in Little v. Little, supra, where the court said, 146 Misc. 231, 262 N. Y. S. 654, at page 655: "If the courts of each state in which the plaintiff may be compelled to seek the enforcement of the Illinois decree, by reason of the defendant's removal from state to state, could each fix the alimony to be paid by the defendant in such amounts as they might respectively deem proper, a defendant might be compelled to pay varying amounts of alimony in various states, a result which is certainly not to be favored." The court therefore concluded that "The proper remedy of the defendant would seem to be to obtain a modification in the courts of the state in which the judgment of divorce was originally rendered."

The portions of the judgment appealed from are reversed, with directions to the trial court to enter judgment in favor of plaintiff.

We concur: NOURSE, P. J.; STURTEVANT, J.

9 Cal.App.2d 464

BANCROFT v. BANCROFT et al.

Civ. 1920, 1921.

District Court of Appeal, Fourth District, California.

Oct. 15, 1935.

Hearing Denied by Supreme Court Dec. 12, 1935.

1. Marriage 🔑50(1)

Trial court *held* justified in concluding that wife suing for maintenance established marriage with defendant where it was admitted that marriage ceremony had been performed and that parties had lived together as husband and wife for at least a year after ceremony, and defendant merely set up facts which might show that wife had a living husband at time of marriage to defendant, and some vague testimony concerning supposed divorce of defendant from plaintiff.

2. Marriage 🔑40(8)

In wife's action for maintenance, where in husband sought to invoke presumption that marriage with plaintiff had been dissolved because of his proving ceremonial marriage with another after marriage with plaintiff, trial court properly invoked statutory presumptions against husband who told vaguely of circumstances which led him to believe that he had obtained divorce from plaintiff (Code Civ. Proc. § 1963, subds. 5, 6, 32; § 2061, subd. 7).

3. Marriage 🔑40(11)

In proceeding by wife against husband to obtain suit money in action for maintenance, question as to whether marriage with plaintiff had terminated was one peculiarly within knowledge of husband who had burden of proof.

4. Husband and wife 🔑300

On husband's appeal from orders allowing costs, attorneys' fees, and alimony pendente lite, to wife in action for maintenance, grounds for reversal which were matters of defense would not be considered; such matters being for trial court.

5. Husband and wife 🔑295

Attorneys' fees of $1,750 for services rendered to wife on husband's appeal from orders allowing trial costs, attorneys' fees, and alimony pendente lite to wife in action for maintenance *held* excessive by $1,000 under record.

Record disclosed that the first order appealed from allowed wife $500 trial costs, and $3,500 on account of attorneys' fees, and that second order appealed from allowed wife $20 per week alimony pendente lite, $200 costs of appeal, and $1,750 attorneys' fees on appeal; that the reply brief filed by wife's attorneys contained but twenty-six pages and citation of but sixteen authorities, including those cited by husband and considered by wife's counsel; that such authorities were entirely insufficient for purpose of appeal; that oral arguments of both counsel could not have consumed more than ten minutes, including interruptions by members of the court; and that a typewritten brief of less than nine pages with citation of eight authorities was filed by wife's counsel after the oral arguments.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Edna G. Bancroft against George Bancroft and others. From two orders, named defendant appeals.

First order affirmed, and second order modified, and as modified, affirmed.

Loeb, Walker & Loeb, Milton H. Schwartz, and Herman F. Selvin, all of Los Angeles, for appellant.

S. S. Hahn, W. O. Graf, and A. B. Edler, all of Los Angeles, for respondent.

MARKS, Justice.

Two appeals from separate orders were consolidated by order of the Supreme Court prior to transfer to this court. The first appeal is from portions of an order allowing plaintiff $500 on account of trial costs and $3,500 on account of attorneys' fees with the reservation of the right to fix the balance of both at the time of trial. The second appeal is from an order allowing plaintiff $20 per week alimony pendente lite, pending appeal, $200 costs of appeal, and $1,750 attorneys' fees on appeal.

In her second amended complaint, to which we will refer as the complaint, plaintiff sought a portion of the property which she alleged was the community property of herself and George Bancroft, to whom we will refer as the defendant, and a monthly allowance for her support and maintenance. She set up three causes of action, the first for adultery, the second for desertion, and the third for failure to provide.

In his answer to the second amended complaint, to which we will refer as the answer, defendant admitted "that in the city of Buffalo, State of New York, on April 7, 1913, plaintiff and defendant participated in a ceremony which purported to make them husband and wife," but denied that they ever have been or are now married. He also denied the facts alleged in the several causes of action we have mentioned. He pleaded several special defenses, among which are statutes of limitations, laches, his marriage to Octavia Broske on May 30, 1916, and the marriage of plaintiff to Clarence E. Holt in 1898, together with an alleged defect in their divorce in Michigan on March 22, 1913, which, it is contended, made their divorce ineffective.

Plaintiff brought defendant into court on an order to show cause and secured the first order under attack here. Defendant appealed from that order and plaintiff secured the second order. The second order to show cause was submitted to the trial judge under the evidence adduced at the first hearing.

The principal contention made by defendant here is that plaintiff failed in her proof of their marriage and therefore cannot recover either support or suit money from him. He divides his argument in support of this contention into two phases: (1) That where marriage is denied by a defendant the plaintiff must prove marriage by a clear preponderance of the evidence before she can receive alimony pendente lite, costs, or attorneys' fees; (2) that as defendant proved a ceremonial marriage with Octavia Broske on May 30, 1916, a strong presumption was raised of the dissolution of the prior marriage that can only be overcome by satisfactory proof that neither party obtained a divorce, which proof plaintiff did not produce. We will consider these contentions in the order we have stated them.

In support of his first contention defendant relies upon the following authorities: Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Ann. St. Rep. 82; Harron v. Harron, 128 Cal. 303, 60 P. 932; McKenna v. McKenna, 70 Ill. App. 340; Vreeland v. Vreeland, 18 N. J. Eq. 43; State ex rel. Lloyd v. Superior Court, 55 Wash. 347, 104 P. 771, 25 L. R. A. (N. S.) 387; McFarland v. McFarland, 51 Iowa, 565, 2 N. W. 269; and 19 Corpus Juris 212, § 512.

In the case of Hite v. Hite, supra (a fair example of the other cited cases), the defendant appealed from an order allowing the plaintiff alimony and suit money in her action for divorce. She relied upon a common-law, not a ceremonial, marriage with defendant, which marriage he stoutly denied. The Supreme Court reached the conclusion that as the fact of marriage had been denied the plaintiff could not be allowed alimony and suit money until she established the fact of marriage by a preponderance of the evidence. A reading of that case and the others cited demonstrates that they are not authority here. Bancroft did not deny the fact of his marriage to plaintiff, nor could he do so, because it was proven as a ceremonial marriage by ample documentary evidence in addition to his own testimony and that of plaintiff. All that he did was to deny the legal effect of this marriage for the reason that the plaintiff was under a supposed disability that prevented her from entering into a lawful marriage with him.

It is established in other jurisdictions that in proceedings of this kind where the fact of marriage is admitted, but its legal effect denied because of some supposed legal disability of one of the parties, the rule announced in the Hite Case and the others following it cannot be applied. The reasons for this distinction are clearly set forth in Lau v. Lau (Sup.) 140 N. Y. S. 310, 311. In that case, as here, the parties had gone through the marriage ceremony and assumed the marital relation. In a suit by the wife the husband admitted the performance of the ceremony, but denied the legal effect of the marriage because the wife had a living spouse of a former undissolved marriage. In discussing the question, the New York court said:

"The defendant having admitted the fact of his ceremonial marriage to the plaintiff, the burden of proof of its invalidity in law under the pleadings as they stand rests upon him, since he asserts it. If it should appear from the evidence that the alleged prior marriage were not valid in law or had been terminated prior to the marriage of the parties to this action, or if the defendant failed in his proof concerning it, then the parties to this action are husband and wife, with the reciprocal rights and duties which flow from that relation. See Brinkley v. Brinkley, 50 N. Y. 184, 193, 10 Am. Rep. 460; also, Vincent v. Vincent (Com. Pl.) [16 Daly, 534], 17 N. Y. S. 497. In the former of these cases a very exhaustive statement of the principles governing this court in determining applications for alimony and counsel fees in cases analogous to the present is made by Judge Folger and is summed up at page 193 of 50 N. Y., 10 Am. Rep. 460, as follows:

"'And the principle at the bottom is this: Where, marriage in fact being denied, the affirmative is upon the party claiming to be the wife to show that an actual marital relation ever existed, there alimony will be denied until that fact is proven to the satisfaction of the court, or is admitted; for it is upon the existence of that relation alone that the right to alimony depends. Where an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some facts set up by the husband, and it devolves upon him to show that fact, there alimony will be granted until that fact is shown; for the relation actually exists upon which the right to alimony depends, and the object of the litigation is to annul that actual relation by showing some other fact, the existence of which is denied. It may be said, too, that for the purposes of an application for temporary alimony there will not be need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action. It is for the interest of society and in aid of public policy that, where the married relation has been in fact assumed, it should not easily and capriciously be laid aside, and where it is averred by the putative wife and denied by the alleged husband, if she makes a reasonably plain case of its existence, she should be furnished with means of temporary support and of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the case.'" The following cases support the same rule: Eickhoff v. Eickhoff, 29 Colo. 295, 68 P. 237, 93 Am. St. Rep. 64; Vincent v. Vincent, 16 Daly, 534, 17 N. Y. S. 497; Finkelstein v. Finkelstein, 14 Mont. 1, 34 P. 1090; Lea v. Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692; and Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255. See, also, 1 Ruling Case Law

898, § 44, and cases cited, and 19 Corpus Juris 212, §§ 513–515, and cases cited.

[1] If we apply the rule announced in the Hite Case to the facts before us, we must conclude, on the record before us, that the trial court was fully justified in concluding that plaintiff established her marriage with defendant by a preponderance of the evidence. Both parties testified that the marriage ceremony had been performed. Plaintiff introduced certified copies of the records which thoroughly established the fact of the ceremonial marriage. It was admitted that the parties had lived together as husband and wife for at least a year after the ceremony. To meet this proof of marriage, defendant did not go beyond the allegations of his answer which set up facts, which might or might not show, if proved, that plaintiff had a living husband at the time of the marriage of the parties, and some very vague testimony concerning a supposed divorce of defendant from plaintiff.

Defendant next contends that because he proved a ceremonial marriage with Octavia Broske, occurring after his marriage with plaintiff, there arose a strong presumption that his prior marriage with plaintiff had been dissolved by divorce, which presumption had not been overcome by the evidence under the rule laid down in Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 757, 31 L. R. A. 411, 52 Am. St. Rep. 180; McKibbin v. McKibbin, 139 Cal. 448, 73 P. 143; Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95; In re Estate of Hughson, 173 Cal. 448, 160 P. 548; Kelsey v. Miller, 203 Cal. 61, 263 P. 200; Everett v. Standard Acc. Ins. Co., 45 Cal. App. 332, 187 P. 996; Marsh v. Marsh, 79 Cal. App. 560, 250 P. 411, and Immel v. Dowd (Cal. App.) 44 P.(2d) 373. The rule is thus stated in the Hunter Case:

> "It is presumed that a person is innocent of crime or wrong. Code Civ. Proc., § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years; or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage."

These cases hold that it is not sufficient for the party asserting the validity of the first marriage to prove that she had not obtained a divorce and had not been served with process in a divorce action brought by her husband. In order to overcome the presumption, she must not only prove those facts, but must prove that her husband was not granted a divorce in any of the jurisdictions in which he resided prior to the second marriage.

[2] In each of the cited cases one of the parties to the first marriage was not in court. Such party was either dead or absent and the presumption that such deceased or absent party had obtained a divorce prior to the second marriage was allowed to prevail in favor of the second ceremonial marriage in the absence of satisfactory proof to the contrary. In the instant case both parties to the second marriage were in court and testified. Defendant told vaguely of circumstances which led him to believe he had obtained a divorce. This was a matter strictly within his own knowledge. Had he obtained a divorce prior to his second marriage, he either knew, or should have known, when and where the decree was granted. Under these circumstances and on these preliminary proceedings, with the defendant on the stand and testifying, and he having failed to produce satisfactory evidence of his divorce from plaintiff, we believe the trial court was justified in invoking the following presumptions against him and against the one we are considering: "That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." Subdivision 7, § 2061, Code Civ. Proc. "That evidence willfully suppressed would be adverse if produced." "That higher evidence would be adverse from inferior being produced." "That a thing once proved to exist continues as long as is usual with things of that nature." Subdivisions 5, 6, and 32, § 1963, Code Civ. Proc.

[3] We are of the opinion that the proper rule on the question we are considering in this proceeding to obtain suit money is that applied in criminal cases in prosecutions for bigamy. In People v. Hunt-

ley, 93 Cal. App. 504, 269 P. 750, 751, it was thus announced: "The question as to whether or not a first marriage no longer exists is one peculiarly within the knowledge of a defendant, and in such a case the burden is upon him to prove it. Commonwealth v. Boyer, supra [7 Allen (89 Mass.) 306]. This burden is not an unreasonable one (People v. Velasquez, 70 Cal. App. 362, 233 P. 359). Then again, the marriage status having been proved, and there being no evidence to show that defendant did not know that his former marriage had been pronounced void, annulled, or dissolved, or that the first wife had been absent for five years without being known by the defendant to be living, the presumption is that the status as shown by the prosecution continued to exist. People v. Stokes, 71 Cal. 263, 12 P. 71."

[4] As we have indicated, defendant urges various other grounds for a reversal of the orders in question. These grounds are all matters of defense and should be thoroughly considered on the trial of the action. That they cannot prevail on this proceeding is made clear in Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877, where the Supreme Court said: "In this action for divorce the defendant appeals from an order requiring him to pay to the plaintiff the sum of $100 a month for her support during the pendency of the action, and the further sum of $250 for counsel fees. If we were hearing an appeal on the merits, we might be disposed to scan carefully the allegations of cruelty, to determine whether a cause of action is well stated. But the marriage is admitted in the answer, and a cause of action for extreme cruelty is sufficiently stated to make out a prima facie case. The purpose of allowing alimony to the wife during the pendency of the action is to enable her to live in the meantime, and to employ counsel who can properly present her case to the court, both in the pleadings and in the introduction of evidence. The merits of the case, where there is no issue as to the marriage, will not be considered on an application for such alimony further than is necessary to determine that the wife is proceeding in good faith, and not for the mere purpose of obtaining money from the husband. Storke v. Storke, 99 Cal. [621] 622, 34 P. 339; Langan v. Langan, 91 Cal. 654, 27 P. 1092; Poole v. Wilber, 95 Cal. 339, 30 P. 548; Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82."

What we have said disposes of all of the contentions of defendant on his appeal from the order granting plaintiff $3,500 on account of attorneys' fees and $500 on account of her costs of the trial of the action as well as those made on the second appeal. However, on the second appeal a question presents itself which we believe deserves our consideration.

The trial court allowed plaintiff $200 costs and $1,750 attorneys' fees on the appeal from the first order. These sums are entirely disproportionate to the costs incurred by plaintiff and the services rendered by her counsel on these appeals.

The only costs to plaintiff is the printing of her twenty-six-page brief, exclusive of covers. The recoverable costs of printing a brief are limited to $100. Section 1034, Code Civ. Proc., as amended by St. 1933, p. 1902. The costs of printing plaintiff's brief could not have equaled that amount. We deem it just to strike out that item from the order and give plaintiff her actual costs of appeal.

[5] The fees allowed for the services of the attorneys on these appeals is greatly in excess of the reasonable value of such services when measured by either the quantity or quality of the work performed by them and the amount involved on the appeals. The reply brief filed by them contains but twenty-six pages and the citation of but sixteen authorities, including the authorities cited by defendant and considered by plaintiff's counsel. These cited authorities were entirely insufficient for our purposes and we have had to make an independent search to satisfy ourselves as to the law governing some of the questions involved. The oral arguments of both counsel could not have consumed more than ten minutes including interruptions by members of the court. A typewritten brief of less than nine pages with the citation of eight authorities was filed by counsel for plaintiff after the oral arguments. The record is not extensive. The attorneys' fees on these appeals should be reduced to $750, which will amply compensate counsel for the work done.

The order of September 7, 1934, allowing plaintiff $3,500 on account of attorneys' fees, and $500 on account of her costs of the trial of the action is affirmed.

The order of October 5, 1934, allowing plaintiff $20 per week alimony pendente lite, pending appeal, $1,750 attorneys' fees, and $200 costs on these appeals is modified by reducing the attorneys' fees to $750 and striking out the $200 costs, and, as so modified, is affirmed.

Plaintiff will recover her costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

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9 Cal.App.2d 483

MILLER v. WING.

Civ. 9185.

District Court of Appeal, Second District, Division 1, California

Oct. 15, 1935.

Hearing Denied by Supreme Court
Dec. 12, 1935.

1. Attorney and client 🔑148(3)

Under contract whereby attorneys were to receive one-fourth of property which client, as surviving wife, might receive as community property, and value of one-fourth of property distributed by executor to trustee above amount shown in executor's final account to be so distributable, attorneys *held* not entitled to one-fourth of a sum of money paid to client as income from entire estate from date of her husband's death.

2. Attorney and client 🔑144

Contract for legal services rendered which was prepared by attorneys should be construed liberally in favor of client.

3. Attorney and client 🔑148(3)

Under contract whereby attorneys were to receive one-fourth of property which client, as surviving wife, might receive as community property, and value of one-fourth of any property distributed by executor to trustee above amount shown in executor's final account to be distributable, in full compensation, attorneys *held* not entitled to additional fees in quantum meruit for services rendered in securing for client certain sum as income from entire estate from date of her husband's death.

4. Appeal and error 🔑1071(6)

In attorneys' action to recover fees under contract and upon quantum meruit, trial court's failure to make finding upon quantum meruit issue *held* not to require reversal where all of services were rendered under express contract and there could be no recovery upon quantum meruit.

5. Appeal and error 🔑1071(6)

In action for legal services rendered under contract and upon quantum meruit, omission to make findings upon issue of quantum meruit *held* not to require reversal of judgment where, had findings been made, they would necessarily have been adverse to appellant.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Will R. King against Mae G. Wing. From a judgment for defendant, and from an order denying motion for new trial, Ralph W. Miller, as administrator of the estate of Will R. King, deceased, appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Edwin J. Miller, of Los Angeles, for appellant.

Alex. W. Davis and Mitchell, Silberberg & Knupp, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this action by an attorney at law to recover attorney's fees claimed to have been earned by him and his assignor, an associate attorney, the court, upon facts for the most part stipulated, construed a contract in favor of the defendant, and held that the fees contracted for had been paid in full. From a judgment in favor of the defendant, plaintiff appealed, and also from the order denying his motion for a new trial. Owing to the death of appellant, the administrator of his estate has been substituted in his place in this appeal, and the references we shall make to appellant will be understood to include the original appellant and also his assignor, as both attorneys stand in the same position toward the employment and the litigation.

At the time the contract was made, the estate of defendant's deceased husband was in course of administration with a corporate executor, and under a will leaving substantially all of the estate to a trustee, the income during her lifetime being payable to respondent. The executor had filed an account current, which had been approved and settled, and a final account, report, and petition for distribution, upon which no hearing had been had. Respondent (as shown by recitals of the contract) was making numerous claims against the estate, among which the following were specifically enumerated: That the entire estate was community property of defendant and her deceased husband; that all of the estate had not been accounted for by the executor; that certain of the property had been illegally sold and some sold for an insufficient consideration; that claims against the estate had been wrongfully allowed; that claims due the estate had been wrongfully released; that certain bequests and releases of indebtedness provided for in the will were chargeable only against the decedent's share of the community property; and that the amount of the estate was materially greater than as shown in the executor's account. She had previously had a contract of employment with appellant. She employed another firm, which we will refer to as the second attorneys. The contract in question was a reemployment of appellant, and effected a cancellation of the previous agreement. In addition to the contract with appellant, respondent made an identical one with the second attorneys.

The provisions of the agreement regarding compensation are the following: "First party agrees to pay to said second parties, and second parties agree to accept in full compensation for their services heretofore and hereafter rendered in the premises, as herein provided for, one-fourth (¼th) of any and all amounts and property which may hereafter be procured by or distributed to first party as her community property interest in said estate, or which shall be procured or recovered by her as such, in any proceeding or action at law, or suit in equity, or by compromise, or otherwise, after deducting from said community interest recovered or procured, as aforesaid, by first party, forty per cent thereof, to compensate her for the income she would otherwise receive therefrom under and pursuant to the terms and conditions of said decedent's will; and first party also agrees to pay to second parties a sum equivalent to the value of a one-fourth (¼th) part of the amount and property of said estate which shall be distributed by said executor to the trustee of said estate, over and above the amount and property which is set forth and provided to be distributed to said trustee under and pursuant to said executor's final report and account and petition for distribution, now on file in the above-named proceeding."

As the result of objections filed to the final account and a compromise effected during the course of trial, the following results were accomplished to the benefit and advantage of the client: By the terms of the will, an indebtedness of $8,000 due decedent from a brother was forgiven, but according to the account, as filed, a claim of the brother against the estate for money due had been allowed by the executor; under the compromise, the brother paid to respondent free from the trust the sum of $3,250. One-half of the gross estate was agreed to be community property which, under the stipulation of facts, was agreed to be equivalent to one-fourth of the net estate distributed from the executor to the trustee. In addition to the foregoing, respondent received in the distribution the sum of $12,000 as income from the estate during the course of administration. Under the final account of the executor which was referred to in the contract of employment, it did not appear whether the executor would dispute respondent's right to the income; however, it transpired that the executor contended that the widow was entitled to receive income only from the time the estate passed into the trust. She contended, in objections filed by the attorneys, that she was entitled to the income from the entire estate from the date of her husband's death. The court held with her on this point.

[1] The sole question as to the right to compensation under the contract is whether the attorneys are entitled to receive one-fourth, or any share of this sum of $12,000, paid to the respondent as income. It is admitted that they have been paid the sum of $3,000, which is all they were entitled to receive as their share of the other property coming to respondent as a result of the contest. The trial court found that the contract did not relate to any income respondent received in the settlement. This interpretation, as we read the contract, is the correct one. The attorneys were entitled to one-fourth of any property respondent might receive as community property. This they received. The $12,000 came to respondent under the will and not as community property. The attorneys were also entitled to receive the value of one-fourth of any property distributed by the executor to the trustee, above the amount shown in the executor's final account to be so distributable. The $12,000 did not fall within that class. The executor had accounted for all of the income; the only question was whether the income accumulated during the administration should go to the widow or to the

trust estate. Appellant contends that the contract means that the attorneys' fees should be computed on the basis of one-fourth of any additional property distributed to respondent and that, under such construction, they would be entitled to one-fourth of the $12,000. The provision governing this phase of the agreement relates, however, in plain terms to property distributed by the executor to the trustee and does not relate to income payable to respondent.

[2] In addition to the first cause of action of the complaint, which was upon the contract, the complaint contained a second cause of action for money had and received and for the value of legal services rendered. It is contended that if the contract did not provide for compensation of the attorneys for their efforts in gaining for respondent a greater share of the income, they were, nevertheless, entitled to receive the reasonable value of these services, and that one-fourth of the amount should be accepted as a proper basis of value. This position appears to us to be untenable. In the first place there is no ground for the assumption that the services relating to the matter of income were outside of or in addition to those covered by the contract. We find the following recital in the contract: "and unless due and timely proceedings are taken on behalf of first party the estate of said decedent will likely be distributed, in accordance with said account and petition, to the trustee named in said will * * * and first party be thereby deprived of her community property and considerable other property rights in said estate." It further reads: "First party retains and employs second parties as her attorneys to represent her in the preparation and prosecution of her claims aforesaid in any and all such proceedings in the Superior Court, or any court on appeal which second parties and the associate attorneys hereinafter mentioned may deem advisable; and second parties accept said retainer and employment for such purposes and agree to prosecute said proceedings to the best of their professional skill and ability in the premises in first party's behalf." And in the provision for compensation, which we have quoted, the stipulated fee was to be "in full compensation" of the attorneys. It appears that the employment was a general one to represent respondent in all matters then in controversy or which might incidentally arise in the course of the proceedings, to the end of gaining for the client a just share of the estate. This was undoubtedly the construction placed upon it by the parties, for the attorneys proceeded to present their client's claims to the income from date of death, without mentioning the fact that they considered such services to be in addition to those they were under contract to render. It would be giving an extremely narrow construction to the contract to hold that the attorneys were undertaking to limit the representation of their client to a recovery of property which she was to divide with them. We think a much fairer construction is one under which the client became entitled to the attorneys' services in advocating all of her rights as the surviving wife, and all that arose in her favor under the will, and that the stipulated compensation is all that they have a right to receive. Furthermore, the agreement should be construed liberally in favor of the client. She had nothing whatever to do with its preparation. All negotiations leading up to the agreement were conducted by the second attorneys and appellant. All respondent did was to sign the contract after its terms had been agreed upon by the attorneys. The second attorneys, who represented respondent in negotiating the new contract with the first attorney, were likewise paid a fee of $3,000 for their services, and this sum was accepted as payment in full under the contract.

[3] We are therefore of the opinion that appellant has not rendered any services additional to those which he contracted to perform and that having received the stipulated compensation he has been paid in full.

[4, 5] The court made no finding upon the second cause of action and this omission, it is claimed, requires a reversal. Since all of the services were rendered under the express contract, there could be no recovery upon quantum meruit, and findings upon this cause of action were unnecessary. An additional reason for so holding is that the record presents, either in the stipulated facts or the testimony, no basis for a finding as to the extent of the particular services in question, nor does it appear which set of attorneys rendered such services. Had findings been made under this cause of action they, of necessity, would have been adverse to appellant and, therefore, the omission to make them

furnishes no cause for reversal of the judgment.

The judgment is affirmed. The appeal from the order denying motion for new trial is dismissed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 461

MITCHELL, Insurance Com'r, v. HOLMES et al.

Civ. 5214.

District Court of Appeal, Third District, California.

Oct. 15, 1935.

1. Appeal and error ⇨1010(1)

Appellate court will not disturb judgment where there is any substantial evidence to sustain findings of fact.

2. Insurance ⇨606(5)

In action by insurer against tort-feasors who had damaged automobile covered by collision policy as subrogee to owner's rights under policy, evidence *held* to support judgment for defendants based on finding that, at time of execution of release by owner, defendants were without knowledge of insurer's rights.

3. Insurance ⇨606(5)

Insurer's right of subrogation to automobile owner's rights under collision policy, as against person damaging automobile covered by policy, *held* lost by owner's release of tort-feasors from liability for collision, without knowledge of insurer's interest.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by E. Forrest Mitchell, Insurance Commissioner of the State of California, as liquidator of the Union Indemnity Company, insolvent, against Mary G. Holmes and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Niles C. Cunningham and W. M. Roll, both of San Francisco, for appellant.

Albert J. O'Brien and Langton A. Madden, both of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The Union Indemnity Company issued a policy of insurance to William Willis insuring his automobile against damage by collision. Thereafter a collision did occur between the automobile of Willis and one owned and operated by Martin M. Holmes. As a result of this collision the car of Willis was damaged beyond repair, and on July 16, 1930, the Union Indemnity Company, under the terms of the policy of insurance, paid to him the sum of $350. The salvage value of the damaged car amounted to $45, which sum was collected by Union Indemnity Company, making a net loss of $305, which was sustained by Union Indemnity Company.

This action was commenced by Union Indemnity Company against Margaret G Holmes and Martin M. Holmes, respondents herein, under subrogation rights granted it in its policy of insurance issued to Willis. The accident was caused by the admitted negligence of respondents. An answer was filed by respondents pleading as a special defense, a written release executed by William Willis and his wife, Gertrude C. Willis, wherein in consideration of the sum of $2,000 they released respondents of all claim, demand, right, or cause of action by reason of damage either to person or property as a result of the collision. The release was executed July 16, 1930.

On July 19, 1930, the Union Indemnity Company addressed to respondents a letter advising them the Union Indemnity Company carried collision insurance on the car of Mr. Willis and had paid a loss thereon in the sum of $350.

Subsequent to the commencement of this action, the Union Indemnity Company became insolvent, and E. Forrest Mitchell, as insurance commissioner of the state of California, was substituted in its place as plaintiff.

The trial court made findings of fact in accordance with the allegations of the complaint and found that "at the time of the payment of said sum of $2,000.00 and the execution of said release, the defendants * * * and their agents had no knowledge * * * that said Union Indemnity Company * * * was subrogated to the rights of said William Willis in * * * any amount." Judgment was entered in accordance therewith. From which judgment plaintiff appeals asserting that there is no substantial evidence to sustain the finding of the trial court.

[1] The familiar rule of appellate practice, that where there is any substantial evidence to sustain the findings of fact the appellate court will not disturb the judgment of the trial court, requires no citation of authority.

[2] An examination of the testimony of various witnesses discloses that the trial court could, as it did, arrive at the conclusion that the tort-feasors had no knowledge, actual or constructive, of the interest of the insurer.

The adjuster for the Occidental Indemnity Company, which company carried insurance on the respondents herein, and which company paid the $2,000 to Mr. Willis, testified that he was told by Mr. Willis that he carried some insurance but did not know what it was, and that he (the adjuster) did not know Mr. Willis carried any collision insurance. Mr. Armstrong of the Fireman's Fund Insurance Company, which carried the policy protecting respondents in regard to property damage, testified that not until the receipt of a letter from Union Indemnity Company a few days after the settlement of the claim was it known that the Union Indemnity Company was interested in the Willis car.

Mr. Roll, attorney for Union Indemnity Company, testified he wrote the letter referred to in the testimony of Mr. Armstrong and that it was the first communication to the parties in interest advising them that Union Indemnity Company had paid $350 on account of collision loss. Mr. Willis testified he told Mr. Randall, the adjuster for the Occidental Insurance Company, that he had been paid $350 by the Union Indemnity Company for the damage to the car, but that is denied by Mr. Randall, and it is not the province of this court to weigh conflicting testimony; that function has been performed by the trial court. We believe there is sufficient evidence to support the findings.

[3] The release having been given therefor without knowledge of the interest of the Union Indemnity Company, the right of subrogation is lost. The case of American Automobile Insurance Co. v. Clark, 122 Kan. 445, 252 P. 215, 217, seems to be directly in point. The court there said: "It seems to have been plaintiff's theory of the case that defendant's settlement with Richardson had no bearing on plaintiff's subrogated claim against defendant. If such indeed was plaintiff's theory of the case, it was in error. Its claim against defendant drew its only virtue, if any it had, from its contract with Richardson. It received from Richardson by subrogation, by express or implied assignment, whatever right of action for damages Richardson had against Parker's employer, this defendant. If Richardson settled with defendant whatever claim he had against the latter, there was an end of defendant's liability. We might have an altogether different case to consider if defendant had known of plaintiff's claim through subrogation to the rights of Richardson before defendant settled with Richardson. There was such an issue of fact in this lawsuit, but it was settled by the jury in favor of defendant, and there was no want of testimony to support that finding implied in the general verdict; and the fact that some rather persuasive testimony was adduced tending to show that defendant had been notified by the plaintiff's agent of its claim through subrogation after it had paid Richardson and before defendant had settled with Richardson is of no consequence, since the jury's general verdict discredited that testimony."

The judgment therefore should be affirmed, and it is so ordered.

I concur: THOMPSON, J.

9 Cal.App.2d 454

In re KNIGHT'S ESTATE.

WESEMAN v. JUNE.

Civ. 10543.

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1935.

Rehearing Denied Nov. 8, 1935.

1. Wills ⚷155(1)

To establish undue influence in execution of will, it must be shown that such influence has not only been exercised, but that it has produced effect in mind of testator by which will executed was not expression of his own desires.

2. Wills ⚷163(8)

Presumption of undue influence in execution of will is not raised by proof of interest and opportunity alone.

3. Wills ⚷166(2)

Evidence *held* insufficient to support judgment denying probate of will of testatrix who executed will at age of eighty-two years following cerebral hemorrhage and partial paralysis of left side, on ground of undue influence of proponent who had lived in rented room in home of testatrix for six years prior to her death although confidential relationship had existed between proponent and testatrix.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceedings in the matter of the estate of Nora A. Knight, deceased. Petition of J. E. June for the probate of the will of Nora A. Knight, deceased, opposed by W. E. Weseman. From a decree in favor of W. E. Weseman, contestant, denying the probate, the proponent appeals.

Reversed.

Joseph M. Maltby, of Long Beach, for appellant.

Oscar J. Seiler, of Long Beach, Burr A. Brown, of Oceanside, and Philbrick McCoy, of Los Angeles, for respondent.

WOOD, Justice.

Nora A. Knight died on January 24, 1934, at the age of eighty-two years. Her holographic will, dated December 19, 1933, was presented for probate and was contested by W. E. Weseman, brother of deceased, upon the ground of undue influence on the part of proponent, J. E. June. The trial court found that the execution of the will was brought about by the undue influence of proponent and denied its admission to probate. From this judgment, proponent appeals, contending that the evidence is insufficient to support the findings on the subject of undue influence.

The evidence on which the trial court based its finding of undue influence is, substantially, as follows: Mrs. Knight lived on real property which she owned of the value of about $7,000, this property comprising about seven-eighths of her estate. Several years before her death, Mr. June, who at the time of the trial was seventy-nine years of age, rented a room in the home of deceased, with kitchen privileges, for the sum of $10 per month. On June 5, 1933, Mrs. Knight suffered a cerebral hemorrhage which resulted in partial paralysis of her left side. On that day she was visited by a number of neighbors, among them Mrs. Kirkland. Mrs. Knight requested Mr. June to call a notary public. Mrs. Kirkland suggested the name of Velma Fuhrer. Mr. June called for Mrs. Fuhrer, who returned to the home with him. In the presence of a nurse and the proponent, the notary public prepared "a codicil to the last will and testament of Nora A. Knight," giving to Mr. June a life estate in the home and naming Mr. Kirkland executor. She also prepared a bill of sale giving Mr. June her furniture. These documents were signed by Mrs. Knight. After June 5, 1933, Mrs. Knight improved in health. Early in October she suffered a slight stroke of paralysis. During the six years that proponent lived in the home of deceased, the relationship of landlady and tenant ripened into one of mutual affection. Mr. June cared for the premises, did much of the house work, attended to business affairs, and ran numerous errands for Mrs. Knight. After the illness of June 5th, the acts of service and of kindness on the part of proponent increased. The nearest approach to testimony showing any activity on proponent's part in securing the execution of the will in question comes from the proponent himself. He states that two or three days before the will was made Mrs. Knight asked him to get a tablet "when he went down by the Ten-Cent Store"; that she did her writing when the nurse was out, Mrs. Knight saying, "The nurse tells everything"; that Mrs. Knight asked him to write the word "executor" on a piece of paper because she said she did not know how to spell it. Mr. June further testified: "I did so, and then she showed me, she showed me on that what she had written—'I want June to be executor.' That is all I know about the will. She showed that to me. I was impressed it was a will on that account, and then now she says, 'You write your name on an envelope,' and I did, and gave it to her, and she put that paper into the envelope and sealed it with her own hands, and she says, 'This is not to be opened as long as I live, and I shall write it on the envelope "This envelope is not to be opened as long as Mrs. Knight lives."' Now, she says, 'Put it in your trunk with my other papers,' and I did so."

In case of intestacy, Mrs. Knight's property would go to contestant, a brother living in another state and in no need of assistance. In the will offered for probate the home property is given to proponent in fee.

[1-3] Among the findings of the trial court the following appears: "That at the time said will is purported to have been executed the said June succeeded in substituting his will for the will of said decedent, and used his said influence over the said decedent and induced her to execute the said document purported to be the last will and testament of the decedent; that the said June, by supplanting his will for that of the decedent, and by taking advantage of the trust and confidence reposed in him by the said decedent, succeeded in having the decedent devise and bequeath to him by the said document purporting to be her last will and testament the real property of the decedent. * * *" In our opinion the proof falls short of the requirements to support this finding. The formal execution of the will is conceded and no contention has been presented that the testatrix did not have mental capacity to make a will. "In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires." Estate of Calkins, 112 Cal. 296, 44 P. 577, 578. "The presumption of undue influence is not raised by proof of interest and opportunity alone. * * * In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." Estate of Langford, 108 Cal. 608, 41 P. 701. Doubtless, contestant has proved a confidential relationship between deceased and proponent and perhaps a weakened mental condition on the part of deceased, together with opportunity to exert undue influence. On the other hand, it cannot be successfully maintained that the will was unnatural or that proponent took such a part in the execution of the will as to throw the burden of proof on him to show freedom from undue influence. To hold that proponent performed any act that could be classified as an act of undue influence would be to enter upon the field of conjecture.

The judgment is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

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9 Cal.App.2d 457

RAHR MALTING CO. v. KOCH BREWING CO. et al.

Civ. 10487.

District Court of Appeal, Second District,
Division 2, California.
Oct. 15, 1935.

1. Husband and wife 🔑131(1)

Burden of proving that property attached was wife's separate property was on wife, since she had affirmative of issue (Code Civ. Proc. § 689, as amended by St. 1933, p. 1887).

2. Appeal and error 🔑994(3)

Where much of witness' testimony at hearing conflicted with her deposition taken before trial, whether such conflict affected weight and value of witness' testimony *held* for trial court.

3. Husband and wife 🔑262(1)

Presumption that fund acquired by wife subsequent to marriage was community property was evidence thereof and trial court was not bound to believe wife's testimony that fund attached was her separate property (Civ.

Code, § 164; Code Civ. Proc. § 689, as amended by St. 1933, p. 1887).

4. Husband and wife ⚿133(1)

Presumption that fund attached was community property, when considered with wife's testimony that fund was her separate property, *held* to raise conflict in evidence sufficient to support finding that fund was not wife's separate property (Civ. Code, § 164; Code Civ. Proc. § 689, as amended by St. 1933, p. 1887).

5. Appeal and error ⚿1048(2)

Error in requiring husband to testify over wife's objection, as to whether property attached was wife's separate property as she claimed, *held* not prejudicial where wife's counsel conceded that husband's testimony did not militate against wife's claim (Civ. Code, § 164; Code Civ. Proc. § 475; § 689, as amended by St. 1933, p. 1887; § 1881, subd. 1, as amended by St. 1933, p. 1424; Const. art. 6, § 4½).

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Attachment proceeding by the Rahr Malting Company against the Koch Brewing Company, also known as Koch Brewing Co., and others wherein Hazel F. Solomon was a third party claimant. From an adverse judgment, the third party claimant appeals.

Affirmed.

A. S. Newburg and Horowitz & McCloskey, of Los Angeles, for appellant.

George W. Rochester, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is a purported appeal by third party claimant, appellant herein, from the judgment of the trial court based on findings that a fund held in a bank by virtue of a writ of attachment was community property of appellant and her husband, defendant in the action, and not appellant's separate property. The hearing was held pursuant to the provisions of section 689 of the Code of Civil Procedure (as amended by St. 1933, p. 1887), appellant having alleged in her claim that the fund was her separate property.

Appellant relies for reversal of the judgment solely on the following propositions:

First. The evidence is insufficient to support the findings of fact.

Second. The trial court erred in overruling appellant's objection to her husband's testifying at the hearing held in accordance with the provisions of section 689 of the Code of Civil Procedure, in view of the rule stated in section 1881, subsection 1, of the same Code.

[1, 2] As to appellant's first proposition, the burden of proof was upon third party claimant, since she had the affirmative of the issue. Scott v. Wood, 81 Cal. 398, 402, 22 P. 871. This she attempted to sustain after being sworn, by testifying, the fund in question was acquired subsequent to her marriage with the defendant; also as to various sources of origin of the fund, which tended to show the money was her separate property. Much of appellant's testimony at the hearing was in conflict with testimony which she had previously given at the taking of her deposition. It was for the trial court to determine how far, if at all, this circumstance affected the weight and value of her testimony. Thompson v. Davis, 172 Cal. 491, 494, 157 P. 595.

[3] Evidence that the fund was acquired subsequent to marriage gave rise to the presumption that it was community property. Section 164, Civ. Code; Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919. Such presumption is itself evidence. Moore v. Gould, 151 Cal. 723, 726, 91 P. 616; Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919. The trial court was not bound to believe the interested witness as against the presumption. Adams v. Hopkins, 144 Cal. 19, 36, 77 P. 712. This rule is very clearly stated by our Supreme Court in Sarraille v. Calmon, 142 Cal. 651, 76 P. 497, wherein it was held that declarations of witnesses to the effect that certain notes had been paid, considered in connection with the presumption of nonpayment, arising from possession of uncanceled notes, produced a conflict in evidence for determination by the trial court. Mr. Commissioner Chipman says at page 655 of 142 Cal., 76 P. 497, 498:

"In weighing the testimony before it, the court evidently was unwilling to accept the declarations of the witnesses offered to prove payment as producing conviction in its mind. The presumption of nonpayment arising from possession of uncanceled notes, admittedly executed by de-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

fendant, was evidence that they were not paid, and produced a conflict with the evidence of defendant's witnesses. We cannot put ourselves in the shoes of the judge who had the witnesses before him; we cannot say to what extent he discovered what he thought were inherent improbabilities in the statements of witnesses; nor can we say how far the witnesses, by their manner of testifying, may have given rise to doubts of their sincerity, or may have impressed the judge with their having given a wrong coloring to material facts. * * * It is sufficient to say that the evidence was in conflict, and the conclusion of the court cannot now be disturbed."

In Thompson v. Davis, 172 Cal. 491, at page 493, 157 P. 595, 596, a case in which our Supreme Court considered the effect to be given the presumption raised by section 164 of the Civil Code, Mr. Justice Sloss, speaking for the court, says:

> "But the presumption, 'although disputable, is itself evidence, and * * * it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose.'"

[4] The presumption that the fund was community property considered in connection with appellant's testimony tending to prove it her separate property thus raised a conflict in the evidence which was sufficient to support the findings of the trial court. Moore v. Gould, 151 Cal. 723, 726, 91 P. 616; Smellie v. Southern Pacific Co., 212 Cal. 540, 550, 299 P. 529.

[5] Turning to defendant's second proposition, the trial court erred in requiring defendant's husband to testify over appellant's objection, which should have been sustained, in view of the provision of subdivision 1 of section 1881 of the Code of Civil Procedure, as amended by St. 1933, p. 1424, wherein it is stated, "A husband cannot be examined for or against his wife without her consent." Ayres v. Wright, 103 Cal. App. 610, 619, 284 P. 1077; Marple v. Jackson, 184 Cal. 411, 413, 193 P. 940.

Since it is conceded by appellant's counsel that nothing in the husband's testimony in anywise militated against her case, this error was not prejudicial to appellant and therefore will be disregarded by this court. Article 6, § 4½, Const. Calif.; section 475, Code Civ. Proc.; Burks v. Stearns, 78 Cal. App. 108, 110, 248 P. 274.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 447

LAUKKARE v. ABRAMSON.

Civ. 5323.

District Court of Appeal, Third District, California.

Oct. 11, 1935.

1. Appeal and error 🔑907(3)

On appeal upon judgment roll alone, appellate court was bound to presume, in support of trial court's finding that rejected claim against estate was handed to claimant's attorney, that such action was notice to claimant of rejection of claim on that date.

2. Appeal and error 🔑907(3)

On appeal upon judgment roll alone, appellate court must presume that evidence offered in support of findings was sufficient to support facts found.

3. Principal and agent 🔑177(1)

Knowledge of agent is imputed to his principal.

4. Attorney and client 🔑104

Knowledge of attorney is imputed to his clients.

5. Executors and administrators 🔑437(7)

Where claimant was chargeable with notice of rejection of claim against estate at time rejected claim was handed to claimant's attorney about January 20, 1934, action on claim commenced April 25, 1934, *held* barred (Probate Code, § 714).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Sofia Laukkare against Lizzie Abramson, as administratrix of the estate of Malakius Aho, also known as M. Aho, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Lilburn Gibson, of Ukiah, for appellant.

Norman Johnson, of Fort Bragg, and Thomas & Thomas, of Ukiah, for respondent.

MONCUR, Justice pro tem., delivered the opinion of the court.

The question on this appeal involves the sufficiency of notice respecting rejection of a claim against the estate of a deceased person. The action is one on a claim for services alleged to have been performed by the plaintiff for August Aho, son of Malakius Aho, deceased, at the special instance and request of defendant's decedent and of whose estate the defendant, Lizzie Abramson, is the duly qualified and acting administratrix.

The facts necessary to a decision of the issue are set forth in the findings of the trial court, which findings are as follows: "That the said Malakius Aho died on the 3d day of December, 1933, and that his said son August Aho had died prior to that time; that notice to creditors of said Malakius Aho was duly given and published and that in due time plaintiff presented her claim to the said Lizzie Abramson as administratrix of the estate of said Malakius Aho, deceased, and which said claim was rejected on the 9th day of January, 1934; that such rejection of said claim was indorsed on the back thereof and signed by the said administratrix on the said 9th day of January, 1934, and within a few days thereafter and more than three months before the complaint was filed herein the said claim so marked 'rejected' was handed to plaintiff's attorney on or about the 19th or 20th day of January, 1934, and that no other written notice of such rejection was ever given; that the complaint herein was filed on the 25th day of April, 1934, and that more than three months therefore elapsed between the time that the claim was so delivered to plaintiff's attorney and the filing of plaintiff's complaint herein."

From the foregoing findings of fact the court concluded that the notice of rejection was sufficient and that the said claim was barred by the provisions of section 714 of the Probate Code of this state. Said section of the Probate Code provides that when a claim is rejected, either by the executor, or administrator, or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice; otherwise the claim shall be forever barred.

[1, 2] This appeal comes before the court upon the judgment roll alone, and we have not before us the evidence taken at the trial of the case. If the facts elicited at the trial showed that at the time of the rejection of said claim plaintiff did not have an attorney representing her and had no attorney up to the time of the filing of the action, the question of the sufficiency of the finding that the rejected claim was handed to plaintiff's attorney on or about the date mentioned might be questioned, but, under the findings of the court as shown by the record, we are bound to presume, in support of the findings, that the handing of the rejected claim to plaintiff's attorney on or about the date mentioned was notice to plaintiff of the rejection of said claim at said date, and it must be presumed that the evidence offered in support of the findings was sufficient to support the facts found. Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045, and cases therein cited.

[3, 4] It is well established by numerous authorities that knowledge of an agent is imputed to his principal and also that the knowledge of an attorney is imputed to his clients.

[5] We therefore conclude that, in the absence of a transcript of the testimony taken at the trial, we are bound by what is found in the judgment roll and are compelled to hold that, under the findings of the court, plaintiff had notice of the rejection of her claim more than three months before the commencement of the action and that her claim is barred.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

9 Cal.App.2d 528

MUTUAL LIFE INS. CO. OF NEW YORK v. FRANCK et al.

Civ. 5353.

District Court of Appeal, Third District, California.

Oct. 17, 1935.

1. Appeal and error 🔑110

Appeal does not lie from order denying motion for new trial (Code Civ. Proc. § 963).

2. Insurance 🔑586

While named beneficiary secures only contingent interest in life policy providing for change in beneficiary by insured, subsequent agreement of insured to make wife sole, irrevocable beneficiary of policy in consideration of property settlement in contemplation of divorce, vests wife with equitable interest in policy which may not be defeated without her consent.

3. Insurance 🔑587

Payment of annual premium on life policy by person other than insured and insured's wrongful attempt to change beneficiary of policy *held* insufficient to destroy validity of policy or avoid binding effect of agreement of insured to make first wife sole, irrevocable beneficiary of policy.

4. Interpleader 🔑26

In suit to determine right to proceeds of life endowment policy, cross-complaint of insured's former wife *held* to state cause of action.

> Cross-complaint alleged marriage of cross-complainant with insured and subsequent procurement of policy in question naming cross-complainant as beneficiary; that in contemplation of divorce insured agreed to constitute cross-complainant sole, irrevocable beneficiary of policy; that divorce decree awarded cross-complainant in another state directed insured to make cross-complainant sole, irrevocable beneficiary of policy according to terms of contract; and that contrary to agreement and decree and without knowledge or consent of cross-complainant insured purported to change beneficiary of policy.

5. Interpleader 🔑29

In suit to determine right to proceeds of endowment life policy, evidence *held* to support finding that cross-complainant acquired vested interest in proceeds of policy either by virtue of insured's agreement or by divorce decree requiring insured to constitute cross-complainant irrevocable and sole beneficiary of policy according to property settlement agreement.

6. Insurance 🔑586

In suit to determine right to proceeds of endowment life policy, payment of premiums on policy from community funds of insured and first wife during time of their marriage or from insured's property *held* not to affect right of first wife to proceeds of policy under agreement of insured to constitute her irrevocable and sole beneficiary of policy.

7. Gifts 🔑10

Insured may make absolute gift of policy to beneficiary.

8. Interpleader 🔑31

In suit to determine right to proceeds of endowment life policy, findings that insured's first wife was given vested interest in policy and that subsequently insured without right or consent of first wife changed beneficiary and made gift of policy to second wife *held* not conflicting, since attempted gift of policy after vesting title in first wife by delivery of policy with promise to make her sole, irrevocable beneficiary thereof was unlawful breach of contract and hence void (Civ. Code, § 1147).

9. Appeal and error 🔑1071(6)

Failure of court to adopt findings on issue raised by answer is not reversible error, where finding, if made to support judgment, would necessarily be adverse to appellant.

10. Appeal and error 🔑1071(6)

In suit to determine right to proceeds of endowment life policy, failure of court to find that insured gave policy to second wife by making her beneficiary thereof and delivering instrument to her *held* not reversible error where other findings determined that insured wrongfully changed beneficiary before gift of policies to second wife and that, although second wife had possession of policies at time of insured's death, she was not sole owner and had no interest therein.

11. Divorce 🔑331

In suit to determine right to proceeds of endowment life policy, divorce decree granted in another state requiring insured to constitute first wife sole, irrevocable beneficiary of policies *held* admissible as evidence of determination of court with respect to disposal of property rights of spouses as incident to divorce proceeding (Const. U. S. art. 4, § 1).

12. Judgment 🔑822(1)

Judgment of court of sister state having jurisdiction of persons and property involved in litigation is competent evidence in proper proceeding in another state of issues necessarily determined thereby (Const. U. S. art. 4, § 1).

13. Divorce 🔑326.

Decree of divorce rendered by court of sister state which appears to be regular on face is presumed to be valid, and in absence of proof to contrary, it will be assumed that court rendering such decree was invested with jurisdiction of persons and property affected thereby.

14. Interpleader 🔑18
Judgment 🔑934(1)

Suit of first wife of insured to establish right to proceeds of endowment life policy based on insured's wrongful change of beneficiary and attempted transfer of policy to second wife *held* not barred by laches or limitations where suit was commenced within one year after discovery of change of beneficiary, although divorce decree requiring insured to constitute first wife irrevocable beneficiary of policy in accordance with property settlement agreement was entered more than six years before commencement of action (Code Civ. Proc. § 336).

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by the Mutual Life Insurance Company of New York against Coral La Fontaine Franck and Beulah Franck, in which each defendant filed a cross-complaint. Judgment for defendant and cross-complainant Coral La Fontaine Franck, and defendant and cross-complainant Beulah Franck appeals.

Affirmed.

W. H. Douglass and John M. Atkinson, both of Los Angeles, for appellant.

Bicksler, Parke & Catlin and W. G. Danielson, all of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant and cross-complainant Beulah Franck has appealed from the judgment rendered against her in a suit to determine the right and title to the proceeds of an endowment policy.

Albert J. Franck and the respondent Coral La Fontaine Franck were married July 13, 1917. They established their home in Nevada. Two fifteen-year endowment life insurance policies numbered 2658767 and 2658771, respectively, for the sum of $5,000 each were issued to him October 22, 1919. The annual premium on each policy was the sum of $348.80. His wife Coral was named as beneficiary in each of these policies. During their married life the premiums thereon were paid from their community property. In 1921 domestic trouble arose between them on account of which they executed an agreement settling their property rights by the terms of which he promised to pay his wife in the event of a divorce the sum of $250 per month as alimony and covenanted to make her the sole, irrevocable beneficiary of the policies above mentioned. The policies were then delivered to the respondent. These covenants were conditioned upon her remaining unmarried. The respondent never remarried.

February 14, 1921, upon proceedings duly had in the district court of Nevada decree of divorce was rendered by that court in favor of the respondent in which she was awarded $250 per month alimony, together with title to the proceeds of both insurance policies. This decree directed that Albert J. Franck should constitute his wife sole, irrevocable beneficiary of both policies and pay all premiums thereon. This divorce became final. July 5, 1923, without the knowledge or consent of the respondent, contrary to the provisions of the agreement settling their property rights and in violation of the decree of divorce, Mr. Franck purported to change these policies so as to constitute his executors, administrators, and assigns the beneficiaries thereof.

October 19, 1923, Mr. Franck borrowed from the appellant Beulah Franck (then Wheeler) the sum of $348.80 to pay the annual premium on policy No. 2658767. The insured thereafter defaulted in the payment of premiums on both policies, whereupon the duration of each policy was automatically extended pursuant to the terms of the contracts so as to keep them in force. Both insurance policies remained in force until the time of the death of the insured, obligating the insurance company to pay the lawful beneficiary thereof the principal sums due.

June 14, 1924, Albert J. Franck and Beulah Wheeler, this appellant, were married. November 26, 1926, without the knowledge or consent of the respondent, Coral Franck, the insured purported to change the beneficiary of these policies contrary to the terms of the agreement settling property rights and of the decree of divorce and designated this appellant as beneficiary thereof. The insured wrongfully procured policies and delivered them to the appellant. December 31, 1931, Albert J. Franck died, leaving the policies in full force and effect.

Both the appellant and the respondent thereupon demanded of the plaintiff insurance company the proceeds due under the terms of these policies. The Mutual Life Insurance Company of New York then commenced this action against the respondent and the appellant paying into court the proceeds of the policies and asking the court to determine their respective rights thereto and that plaintiff be discharged from further liability under the contracts. The appellant and the respondent filed separate answers and cross-complaints in this action. The demurrer of the appellant to the cross-complaint of the respondent was overruled. September 12, 1932, on motion of the appellant, judgment on the pleadings was rendered against the respondent with respect to policy No. 2658771. No appeal therefrom was perfected and that judgment became final.

This suit was tried by the court on the remaining issue regarding the title to insurance policy No. 2658767 for the sum of $5,000. Findings were adopted favorable to the respondent and judgment was rendered in favor of the appellant for the reimbursement of the annual premium which was paid by her, as hereinbefore mentioned, in the sum of $348.80. Judgment was rendered in favor of the respondent for the balance of the proceeds of the last-mentioned insurance policy in the sum of $4,666.45. From this judgment, the defendant Beulah Franck has appealed.

The appellant contends that the court erred in the overruling her demurrer to the respondent's amended cross-complaint; that the judgment and findings are not supported by the evidence; and that the Nevada decree of divorce is incompetent as proof of title to the proceeds of the insurance policy for the reason that it has not been reduced to a judgment in a California court.

[1] The appellant also assigns as erroneous the order of the court denying her motion for a new trial. It has been frequently held that an appeal does not lie from an order denying a motion for a new trial. Nordin v. Eagle Rock State Bank, 139 Cal. App. 584, 589, 34 P.(2d) 490; section 963, Code Civ. Proc. The notice of appeal from that order is therefore ineffectual.

[2-4] The demurrer to the respondent's cross-complaint was properly overruled. It is contended the amended cross-complaint of the respondent fails to state a cause of action for the reason that it appears therefrom that the insurance policy was not "in full force and effect," and that the California court was without jurisdiction to render judgment determining title to the proceeds of the policy since the Nevada decree of divorce has not been reduced to judgment in this state. This cross-complaint alleges the marriage of the respondent with Albert J. Franck and his subsequent procuring of the insurance policies in question in which she was named as beneficiary; that domestic trouble arose between the spouses and that in contemplation of a future divorce they had an agreement settling their property rights which, among other things, stipulated that the insured would constitute the cross-complainant sole, irrevocable beneficiary of these policies; that a decree of divorce was thereafter awarded to her by the Nevada court, in which she was granted alimony in the sum of $250 per month, and the defendant was directed to make and retain her as sole, irrevocable beneficiary of the policies according to the terms of the contract, but that, contrary to the agreement and to the provisions of the decree of divorce, and without the knowledge or consent of the cross-complainant, the insured did purport to change the beneficiary of these policies in an attempt to deprive her of her vested interest therein. The prayer then asked for a decree declaring her to be the owner and entitled to the proceeds of policy No. 2658767 which is involved on this appeal. Paragraph III of this pleading is in the following language:

"That on or about * * * February 14th, 1921, this cross-complainant and Albert J. Franck entered into a property settlement by the terms of which, among other things, it was agreed that said Albert J. Franck was to constitute and make this cross-complainant an irrevocable, sole beneficiary under said policies of insurance and that it was further agreed that this cross-complainant as of that date would have a vested and definite right and interest in and to said policies of insurance and that at no time would said Albert J. Franck cause any change to be made in the beneficiary in any of the policies; that this cross-complainant relied and depended upon said property settlement and agreement and that she was to be the irrevocable, sole beneficiary in said policies and surrendered valuable property rights to said Albert J. Franck because of such reliance."

The cross-complaint of the respondent sufficiently alleges that she has a vested equitable interest in the proceeds of policy No. 2658767 by virtue of the agreement settling property rights independently of the determination of the Nevada decree of divorce. But it is alleged that the divorce decree also vested her with an equitable interest in that policy by providing that "said plaintiff shall irrevocably be made the sole beneficiary under said policies." It has been determined that while a named beneficiary of a policy which provides for a change thereof by the insured, secures only a contingent interest therein, a subsequent agreement of the insured in consideration of a settlement of property rights in contemplation of a divorce by the terms of which he covenants to make her sole, irrevocable beneficiary of the policy, vests her with an equitable interest therein which may not be defeated without her consent. Shoudy v. Shoudy, 55 Cal. App. 344, 352, 203 P. 433; McEwen v. New York Life Ins. Co., 42 Cal. App. 133, 141, 183 P. 373. The facts of the Shoudy Case were very similar to those which appear in this proceeding, except that the decree of divorce did not direct that the wife should be made the irrevocable beneficiary. The insurance policy was not mentioned in the Shoudy decree. It appears in that case that, pending the divorce proceedings, the insured wrote a letter to his sister saying: "Referring to our conversation settlement between Mrs. Shoudy and myself you are at liberty to say to her. * * * She will have an alimony as long as Ruth is with her of $125.00 per month. * * * I have a policy in the Bankers' Life Association, $4,000.00, which I will keep in effect for her as long as she remains single." It does not appear that the decree approved or adopted this agreement. But the decree awarded the wife alimony upon the same terms stipulated in the agreement and failed to mention the policy or the contract to make her the irrevocable beneficiary thereof. After the divorce was granted, Mr. Shoudy wrote to the insurance company saying, "This is to advise that we have just been divorced a few days ago, and I agreed to keep these [policies] in force for her until she may remarry." The company notified him there was no necessity for a change in the policy. Regarding the effect of the property settlement agreement in that case, the court said:

"When Dexter Shoudy, in anticipation of the divorce between himself and his wife, offered as one of the terms of settlement of their property rights 'to keep in effect for her as long as she remained single' said policies, and when this offer was accepted by her the quality of her interest as a beneficiary in said policies became changed from that of a mere expectancy to a more fixed and permanent relation. She had thenceforth an equitable interest in said policies of which she could not be divested by the mere act of the insured in changing the name of the beneficiary."

There is nothing in this cross-complaint to indicate that the policy in question was not in full force and effect at the time of the death of the insured. Neither the fact that some person other than the insured paid one of the annual premiums on the policy, nor the fact that the insured wrongfully attempted to thereafter change the beneficiary contrary to his agreement, destroyed the validity of the policy nor avoided the binding effect of the agreement.

The cross-complaint of the respondent therefore states a good cause of action, and the demurrer thereto was properly overruled.

[5] The appellant contends that the evidence fails to support the findings of the court to the effect that the respondent acquired a vested interest in the proceeds of the policy either by virtue of the agreement settling the property rights or by the decree of divorce which was rendered. The court specifically found that:

"It was mutually agreed that the decedent would pay to Coral (the respondent) the sum of $250.00 per month as alimony for her life unless she remarried and that he further would constitute and make her the irrevocable and sole beneficiary in and to said policies of insurance and that she would have the sole, full and complete right to the proceeds thereof upon his death unless she remarried."

The court also separately found that the decree of divorce was awarded to the respondent together with alimony in the sum of $250 per month while she remained unmarried and that the decree also directed the defendant to make the respondent sole irrevocable beneficiary of the policies, although the decree did not specifically approve or adopt in terms the former property agreement. But it was unnecessary for the decree to formally adopt the terms of the property agreement. The contract itself was sufficient to irrevocably vest the beneficiary with the interest in the policies. That is precisely what the Shoudy Case holds. The evidence in support of the findings that the agreement was made as above related is not as definite or conclusive as it might have been. However, the recitations of the decree in that regard are in almost the exact language which was employed in the former agreement. It is apparent the respondent relied chiefly on the terms of the decree of divorce to establish her claim of title to the policy in question. Nevertheless, there is substantial evidence to support the finding that the agreement was made. Coral Franck testified in that regard:

"Q. * * * You finally settled upon accepting the $250.00 per month alimony and being made the irrevocable beneficiary in the two policies of insurance? A. That was it. Because I was entitled to a share of the community property, on property that he had.

"Q. After this decree of divorce was obtained, what if anything was said or done with regard to these policies of insurance? A. Well, I had them.

"Q. How did you get them? A. Well, that was the arrangement—I had them—and I had with him that arrangement.

"Q. You mean, upon the obtaining of the decree, the policies were delivered over to you? A. Yes."

The decree, which is in evidence, provides in unequivocal language that the respondent was to be made sole, irrevocable beneficiary of the policies. These findings are adequately supported by the record.

[6] We are of the opinion it is immaterial whether the premiums on the insurance policies were paid from the community funds of the respondent and her husband or from his separate property. By agreement he was to keep up the payments of premiums on these policies. There is evidence to support the findings of the court that subsequent to the divorce and after the marriage of Mr. Franck and the appellant she loaned him large sums of money, and that prior to their marriage she loaned him the sum of $348.80 for the purpose of paying one annual premium on this policy. But the judgment reimbursed her for that particular amount, and on her motion she was given judgment on the pleadings for the proceeds of policy No. 2658771. There is evidence that, except as above stated, the premiums on these policies were paid from the community funds of the respondent and her husband until the time of the divorce, after which the obligation to pay the premiums, by agreement, rested on the insured.

[7, 8] The appellant asserts that the findings of court are in irreconcilable conflict by determining that the respondent was given a vested interest in policy No. 2658767, and upon the contrary:

"That on or about November 26, 1926, the insured without any right and without the will, permission or consent of Coral, changed the beneficiary in said policy to Beulah and made a gift thereof to her."

We are of the opinion these findings are not in conflict. The language of the preceding finding may be construed to mean that a lawful gift of the policy was not made to Beulah, but that, in conformity with other findings, he vested the title thereto in the respondent by delivering the policy to her with the promise to make her sole, irrevocable beneficiary thereof. The evident meaning of the foregoing finding is that the insured, in violation of his contract, wrongfully, "without any right" so to do, changed the beneficiary and delivered the policy to his wife Beulah. This was an unlawful breach of his contract and therefore void.

It is true, as the appellant contends, that the interest of a beneficiary in a policy which authorizes a change thereof is not ordinarily a vested right, but, on the contrary, merely an expectancy of an inchoate gift which may be consummated upon the death of the insured, but which is revocable at the option of the insured during his lifetime. Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 98, 243 P. 431; McEwen v. New York Life Ins. Co., 42 Cal. App. 133, 183 P. 373. But the insured may waive his right to change the beneficiary and by contract he may convert the contingent interest in the policy into a vested equitable interest which may not be subsequently defeated by an effort to change the beneficiary without his consent. Shoudy v. Shoudy, supra. The insured may make an absolute gift of the policy to the beneficiary, as the court found that he did in this case. In the case of Lo Presti v. Manning, 125 Cal. App. 442, 445, 13 P.(2d) 1002, 1003, the court said:

"While a life insurance policy may be made the subject of a gift, and the beneficiary to whom the gift has been made may acquire a vested interest therein, such transaction must meet all the requirements of the law in regard to the making of a gift. A verbal gift is not valid, unless the means of obtaining possession or control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee." Section 1147, Civ. Code.

In the present case the insured, for a valuable consideration, not only agreed to make the respondent sole, irrevocable beneficiary of the policy, but he also delivered the documents to her. The fact that he subsequently procured the policies and wrongfully changed the beneficiary and delivered them to the appellant did not confer title upon her, for he was powerless to thus deprive the respondent of her vested right therein. The court found he did this "without any right" so to do. The findings are not conflicting in that regard.

[9, 10] The appellant contends that the court erred by failing to find in accordance with the evidence that the insured gave the policies to the appellant by making her the beneficiary thereof and delivering the instruments to her. The omission is harmless. It is apparent that specific findings on that subject would be adverse to the appellant. A failure of the court to adopt findings upon an issue raised by the answer is not reversible error, when the finding, if made to support the judgment, would necessarily be adverse to the appellant. Jianou v. Pickwick Stages System, 111 Cal. App. 754, 758, 296 P. 108; 2 Cal. Jur. 1033, § 614. Moreover, in effect, this issue was found adversely to the appellant. Finding IX, heretofore referred to, determines that the insured wrongfully changed the beneficiary named in the policies before he gave them to the appellant. This would necessarily mean that the purported gift to her was void. In finding XIII the court determined that while it was true the appellant had possession of the policies at the time of the death of the insured, "it is not true that she was the sole owner of said policy or that she had any right or interest therein." The omission to more specifically adopt findings on that issue is not reversible error.

[11] The admission in evidence of the Nevada decree of divorce is assigned as reversible error for the asserted reason that it is incompetent, not having been first reduced to judgment in this state.

We are of the opinion there is no merit in this contention. This is not a suit to enforce the Nevada decree of divorce. It is a suit to determine the title to the proceeds of an endowment policy which funds are in the custody of the California court from which this appeal emanates. The authenticated copy of the Nevada decree was received in evidence to support the respondent's claim of title. While its terms may not be enforced by contempt proceedings or by process without the state of Nevada, under article 4, § 1, of the Federal Constitution which guarantees "full faith and credit" to judicial proceedings in every other state, it becomes competent evidence of the determination of that court with respect to the disposal of the property rights of the spouses as an incident to the divorce proceeding. It is said in 3 Freeman on Judgments (5th Ed.) p. 2936, § 1425:

"It may be laid down as a general rule that a decree of divorce rendered in one state or territory is entitled to full faith and credit, under the Federal Constitution, in every other state and territory under the same circumstances and subject to the same limitations as any other judgment."

[12] The judgment of a court in a sister state, having jurisdiction of the persons and property involved in the litigation, is competent evidence in a proper proceeding in another state of the issues necessarily determined thereby. In 4 Jones Comm. on Evidence (2d Ed.) p. 3497, § 1879, it is said regarding this subject:

"It is elementary that neither a judgment nor a decree can be directly enforced beyond the state in which it was entered. The effect of process thereon is restricted to the state in which it was issued; and the benefit of a judgment or decree, outside of the state in which it was pronounced, can be secured only by some action thereon, or by presenting it as a defense in some action, or by offering it in evidence to control the determination of the same issue upon which it is relevant."

[13] It is true that the effect of a judgment in a sister state may be rebutted by proof that the court which rendered it was without jurisdiction of the persons or property involved. In re Estate of Hancock, 156 Cal. 804, 106 P. 58, 134 Am. St. Rep. 177; Carlton v. Miller, 114 Cal. App. 272, 299 P. 738. But the jurisdiction of the Nevada court is not challenged in this case. The parties to that divorce proceeding were bona fide residents of that state. Both of them appeared in that action. It must be presumed that court had jurisdiction

of both the persons and the property which it assumed to dispose of. A decree of divorce rendered by a court of a sister state, which appears to be regular on its face, is entitled to the presumption that it is valid. In the absence of proof to the contrary, it will be assumed that the court which renders such a decree is invested with jurisdiction of the persons and the property affected thereby. Delanoy v. Delanoy, 216 Cal. 27, 37, 13 P.(2d) 719, 86 A. L. R. 1321; 34 C. J. p. 1140, § 1615. We therefore assume that the objection to the introduction of the Nevada divorce decree in this proceeding was properly overruled, and that it is competent evidence of the disposal by that court of the policy in question of which it had jurisdiction.

The familiar case of Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, relied upon by the appellant in her challenge to the application of the principle of the "full faith and credit" clause of the Federal Constitution (article 4, cl. 1) is not controlling in this case, for the reason that substituted service upon the defendant in this divorce proceeding is not involved as it was in that case. That opinion was rendered, as the syllabus indicates, on the theory that the judgment of divorce of a sister state when jurisdiction of the defendant is procured only by constructive service, and he does not appear in the case, is not entitled to full faith and credit under the constitutional guaranty. To that decision a very formidable dissenting opinion was rendered by Justices Harlan, Holmes, Brewer, and Brown. The syllabus of the prevailing opinion of the court reads:

> "The mere domicil within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action."

This opinion was based on the theory that there was a defect of jurisdiction on account of constructive service and the failure of the defendant to appear or answer the complaint, which distinguishes such a judgment from one which is rendered in a case based upon personal service of the defendant. The rule which is announced in the Haddock Case has not been extended so as to deny the application of the full faith and credit clause under the circumstances which exist in this case where both parties were before the court which had jurisdiction of the persons and the property involved. We are of the opinion the Haddock Case has no application to the present case in that regard.

Assuming, however, without so deciding, that the authenticated copy of the decree of divorce in the Nevada case was not competent proof of the disposition of the policy in question or of the vested right of the respondent thereto, its admission is harmless for it is merely cumulative of the oral evidence heretofore quoted to the effect that the proceeds of the policy were vested in the respondent by the terms of the previous agreement settling their property rights. If the divorce decree be deemed to be incompetent as evidence in this case, still there is adequate testimony to support the findings and judgment to the effect that the respondent is vested with an interest in the policy in question and that she is entitled to the proceeds thereof.

[14] Finally it is contended this suit is barred by the statute of limitations of both Nevada and this state, and by laches for failure to prosecute this action for more than six years after the rendering of the Nevada judgment of divorce. We are of the opinion this suit is not barred by laches nor by statutory limitation for the reason that this action is not based on the Nevada judgment. The statute of limitations of the state of Nevada upon which the appellant relies is very similar to section 336 of the California Code of Civil Procedure which she also cites as a bar to this action. The last-mentioned section provides that: "An action upon a judgment or decree of any court of the United States or of any state within the United States" must be commenced within five years of the rendition of the judgment. The Nevada statute requires such an action to be commenced within six years. These statutes are not applicable for the reason that this action is not founded on the Nevada judgment. On the contrary, it is based on the fraud of the insured in wrongfully changing the beneficiary of his policies and attempting to transfer them to the appellant contrary to his agreement with the respondent. This breach of contract was not discovered by the respondent until the death of the insured in December, 1931, which was little

more than one year before the commencement of this action.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

* * *

MEYERS et al. v. TEXAS CO. *

Civ. 5355.

District Court of Appeal, Third District, California.
Oct. 15, 1935.

Rehearing Denied Nov. 14, 1935.

Hearing Granted by Supreme Court Dec. 12, 1935.

1. Mines and minerals 🔑79(5)

Lessee's use of alleged erroneous system of testing lessor's oil *held* to furnish no evidence of fraud where method was commonly employed by oil producing industry in that vicinity.

2. Mines and minerals 🔑79(7)

Evidence *held* to establish that lessor's royalty oil was tested for volume and gravity in manner which was then accepted and followed by oil producing industry in vicinity of lessor's well.

3. Mines and minerals 🔑79(5)

Lease requiring lessee to pay to lessor one-sixth part of all oil extracted and saved from premises *held* to require lessee to pay one-sixth of wet oil in its natural condition with free water only removed, and not to require determination of lessor's royalty on basis of clear, processed oil.

4. Mines and minerals 🔑79(5)

Term "oil" as used in lease requiring lessee to pay to lessor on account of royalty one-sixth part of all oil extracted and saved from premises meant the crude oil petroleum well fluid which was produced from the premises after free water was first removed therefrom.

[Ed. Note.—For other definitions of "Oil," see Words & Phrases.]

5. Mines and minerals 🔑79(1)

Term "royalty" as used in oil lease, unless it is otherwise defined, is equivalent to rental and is defined as the consideration for the execution of lease which is payable either in kind or in cash as a stipulated proportion of the petroleum which is produced from the land.

[Ed. Note.—For other definitions of "Royalty," see Words & Phrases.]

6. Customs and usages 🔑12(2)

General established custom respecting conduct of particular business, trade, or enterprise in same vicinity is presumed to be known and accepted by contracting parties with respect thereto, unless contrary appears (Civ. Code, § 1655).

7. Mines and minerals 🔑79(5)

Oil lessors could not plead ignorance of established custom with respect to accepted method of testing oil or assert inaccuracies of that system where lessors accepted payment of royalty determined by such method without objection for six and a half years, especially where lessors were authorized to test or examine apparatus and methods to ascertain volume, gravity or value of lessors' royalties.

8. Appeal and error 🔑1008(3)

When appeal is to be determined by construction of unambiguous language of contract, appellate court is not bound by trial court's construction of contract.

9. Mines and minerals 🔑79(3)

Under oil lease requiring lessee to pay lessors for all gasoline extracted from natural gas produced, one-sixth of proceeds after deducting "costs of extraction," items of depreciation, insurance, administration expense, plant salaries and expenses, and taxes on account of processing and marketing lessors' portion of the product *held* properly included as "costs of extraction," since terms of contract indicated that word "cost" was used in its ordinary meaning.

10. Contracts 🔑152

Words used in contract are to be interpreted in their ordinary and popular sense rather than in a strictly technical manner unless it appears that the parties used them in a technical sense or according to peculiar usage (Civ. Code, § 1644).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Lee D. Meyers and others against the Texas Company. From the judgment, plaintiffs and defendant appeal.

Portion of judgment from which plaintiffs appeal affirmed, and judgment for plaintiffs reversed with directions.

Hanna & Morton, of Los Angeles, and Raymond Kirkpatrick, of Long Beach, for appellants.

Charles C. Stanley, J. A. Tucker, and R. K. Barrows, all of Los Angeles, for respondent.

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*For subsequent opinion see 59 P.2d 132.

Robert M. Searls and William F. Kiessig, both of San Francisco, Paul M. Gregg, L. W. Andrews, A. V. Andrews, A. L. Weil, and McCutchen, Olney, Mannon & Greene, all of Los Angeles, and Pillsbury, Madison & Sutro, of San Francisco, amici curiæ.

PER CURIAM.

The defendant has appealed from a judgment of $116,710.39 which was rendered against it in a suit for an accounting. The judgment is based on the estimated value of plaintiffs' proportion of the oil and gas produced during a period of six and a half years from 1924 to July 1, 1930, from their ten-acre tract of land in Orange county, under the terms of a twenty-year lease which covenants to pay lessors as royalty therefor one-sixth of "all oil, gas, asphaltum or other hydrocarbon substances extracted and saved from said premises." The judgment also includes interest on the unpaid portion of the royalty oil. The defendant ascertained the volume and specific gravity of plaintiffs' royalty oil by means of the commonly used three-point sample test, treated with bisulphide or benzol, with the centrifuge method of demulsifying the contents. All of the plaintiffs' proportion of the oil, determined in that manner, was fully paid for at the agreed market price therefor, except that it was stipulated the defendant still owes plaintiffs the sum of $966.03 on account thereof, which sum was tendered and refused at the time of the trial. The plaintiffs contend, and the court found that the three-point test above referred to is inaccurate and that it fails to determine the true specific gravity of the oil. It is asserted that the core system of testing oil by the application of phenol, which plan was subsequently adopted, is more accurate and results in obtaining a higher gravity. The court accepted the last-mentioned system as the correct method of testing the oil and rendered judgment against the defendant for the market value of the estimated difference in volume indicated by these two methods, applied to all plaintiffs' proportion of the entire production from the leased property for six and a half years prior to July 1, 1930, together with interest thereon.

The plaintiffs have also appealed from a portion of this same judgment in the stipulated sum of $13,382.77, which was allowed and credited to the defendant under the terms of the contract as "cost of extraction" of gasoline from the lessors' proportion of the natural gas produced. It is contended the court wrongfully included therein the items of "depreciation, insurance, administration expense, plant salaries * * * and taxes" incurred by the defendant in processing and marketing the same.

The plaintiffs are the owners of ten acres of land in Orange county, Cal. August 12, 1920, they executed a twenty-year oil lease of this property to the defendant Petroleum Midway Company, Limited, an oil-producing company, the name of which was subsequently changed to the Texas Company.

The provisions of the lease which are chiefly involved on this appeal are the following:

"I. * * * g—That it will pay to said lessors on account of rent or royalty for the premises, one-sixth (1/6) part of all oil, gas, asphaltum or other hydro-carbon substances extracted and saved from said premises; the lessee shall not be required to account to the lessor for, or pay rent or royalty on oil, gas or water produced by the lessee, from the premises and used by it in its operations hereunder, but may use such oil, gas or water free of charge. * * *

"j—That it will pay to the lessors for all gasoline extracted from the natural gas produced on said premises, one-sixth (1/6) part of the proceeds received from the sale thereof after deducting the cost of extraction and for all gas produced, saved and sold off the premises by the lessee; provided, however, that nothing herein contained shall be deemed to obligate the lessee to produce, save, sell, treat or otherwise dispose of gas from said premises or any well thereon.

"k—That it will, in the event it becomes necessary to treat any of the oil produced on said premises to make same marketable, and in the event the lessee erects a plant for that purpose, upon request, treat the royalty oil of the lessors together with its own, charging therefor only the net cost of such treatment.

"l—That it will at the request of said lessors, market in its original state the royalty oil or gas belonging to them, along with and upon the same terms as it markets its own oil or gas produced upon said premises, and pay to said lessors the proceeds therefrom, less the cost of handling after leaving the tank or container, but in no event shall it pay lessors less than the Standard's posted market price.

"m—That it will keep true and correct accounts of the production from said premises, which accounts shall be open and free to the inspection of said lessors, and that it will furnish said lessors on or before the twentieth day of each and every calendar month, a correct written statement of such production for the preceding calendar month. * * *

"III. * * * b—The lessors shall have the right at all reasonable times and during business hours to enter upon the demised premises and to examine and expert the books and accounts and records herein agreed to be kept by said lessee, together with its works, tanks and appliances and to examine, gauge and meter the oil, gas or products produced, found or saved under this lease, either directly by the lessors or through agents or representatives without let or hindrance whatsoever. * * *

"g—The lessors shall have the right to take the royalty herein agreed to be paid for oil produced and sold from said leased premises in money or in kind at their election, which election may be exercised only once in six months, and then only upon thirty (30) days notice in writing served upon the lessee. Unless and until said notice is given, the lessee shall have the right to handle, market, sell and/or otherwise dispose of said royalty oil, with and as a part of the products belonging to the lessee, and pay to the lessors in money, the proceeds thereof, less cost of handling after leaving tank or container."

Pursuant to this lease the defendant drilled wells on the plaintiffs' property which produced a large quantity of oil from 1924 to July 1, 1930, which was all accounted for and paid for, except as hereinbefore stated, on the basis of the "A.S.T.M. centrifuge method," which is the three-point sample test, treated with bisulphide or benzol. This is the method of ascertaining the volume and gravity of petroleum oil which was used by all oil-producing companies in that vicinity during that period of time, with the exception of one or two other companies.

The plaintiffs elected, under the terms of the contract, to permit the defendant to process their royalty oil with its own portion of the product, and accepted without protest throughout that period of time their proportion of the net proceeds of sales determined in the manner above mentioned. From month to month, the defendant furnished plaintiffs with written statements of the production of oil and gas and the proceeds of sales as required by the lease. Subsequent to July 1, 1930, the defendant adopted the core system of testing the oil with the application of phenol, together with the centrifuge method of demulsifying the contents of the test tubes. March 20, 1931, this suit for an accounting was commenced.

The complaint is drawn on the theory that the defendant failed to account for the true volume or gravity of plaintiffs' royalty oil and gas, of which fact they were ignorant until after July 1, 1930, and that they had no knowledge of the scientific methods of ascertaining the volume, gravity, or value of the oil or gas produced and were not aware of the erroneous results of the A.S.T.M. centrifuge method of testing the oil which was employed by the defendant. The answer denies the material allegations of the complaint, and affirmatively asserts that the defendant fully, fairly, and correctly ascertained the true gravity of all oil and accounted for the same, and paid plaintiffs the entire proceeds of sales of all their royalties which accrued under the terms of the lease. It is alleged the defendant complied with the terms of the lease and ascertained the true gravity of the oil by adequate tests, eliminating therefrom the "cut" consisting of water and other impurities so as to determine the true amount of clean, pure oil, and fully accounted to plaintiffs for the proceeds of all sales of their royalty oil and products. As separate defenses, the defendant alleges that the plaintiffs' cause of action is barred by laches and by the statute of limitations and that the lessors' receipt of monthly statements and checks in payment of all royalties and the proceeds of the sales thereof without objection constitute accounts stated which preclude them from disputing the accuracy thereof. After trial of the cause, the court adopted findings favorable to the plaintiffs on all the material issues and rendered judgment accordingly.

On appeal the defendant asserts that the findings and judgment are not supported by the evidence; that the measure of damages which was adopted by the court and the amount thereof is speculative, uncertain, and erroneous; that the oil was tested and the true volume and gravity thereof were ascertained by means of the method which was in common use by the oil industry and trade in that vicinity; that the plaintiffs were entitled under the terms of the lease to only one-sixth portion of the crude oil produced, after eliminating therefrom the free water, tested according to the accepted method which was then employed by the oil industry in that vicinity, or to the net proceeds of the sales of the oil and gas therefrom; that the court erroneously allowed interest on the assumed unpaid portion of such proceeds; that the plaintiffs' cause of action is barred by laches and by the statute of limitations; and that plaintiffs are estopped from asserting the alleged errors upon which they rely on the doctrine of accounts stated or by virtue of accord and satisfaction.

A voluminous record on appeal contains much conflicting expert evidence concerning the relative merits of various methods of testing oil to ascertain the true volume and gravity thereof, together with the details of scientific processing of petroleum and a mass of figures which affords ample opportunity for mental gymnastics.

[1] This case was not tried on the theory of actual fraud, although the plaintiffs assert that the defendant's use of an erroneous method of testing oil amounts to constructive fraud. The mere use of an erroneous system of testing oil, however, furnishes no evidence of fraud, where that method is commonly employed by the oil producing industry in that vicinity. There is no evidence indicating that the defendant knowingly continued to use the three-point system of testing oil with the intention of defrauding the plaintiffs. We are of the opinion the record contains no satisfactory evidence of either actual or constructive fraud.

Except for one difference, which appears in section III, subdivision g, of the contract which is involved in this case, the appeal is fully determined by the opinion of the Supreme Court which was recently rendered in the case of Alamitos Land Company v. Shell Oil Company, 44 P.(2d) 573. That case was also a suit for an accounting under circumstances similar to those which are involved in this action. The provisions of that contract, like the language of this lease, covenanted to pay plaintiff "one-sixth royalty interest in all oil and gas produced and saved from the demised premises." The judgment for nearly half a million dollars, which was rendered therein, is reversed on the ground that the language of the contract required only the delivery of the lessors' stipulated proportion of the petroleum well fluid in its natural state, less the free water therein contained which was first eliminated, the volume and gravity of the wet oil having been ascertained by the three-point sampling method tested by the use of carbon bisulphide or benzol, which was the method commonly used by the oil producing industry in that vicinity. On the contrary, that case specifically holds that the lessee was not required to deliver refined royalty oil which was clear, pure, and free from all water and impurities in emulsion therewith. Various methods of testing oil are also elaborately discussed in that opinion. The method by means of which the volume and gravity of the royalty oil were ascertained in this case was also followed in the Alamitos Land Case, and it was there held to be substantially accurate and correct, and in accordance with the accepted custom of the trade or industry in that vicinity, which is the very locality involved in this litigation.

[2] The evidence in this case satisfactorily establishes the fact that the plaintiffs' royalty oil was tested for volume and gravity in the manner which was then accepted and followed by the oil producing industry in the vicinity of their wells, in spite of the fact that one or two other companies employed another method of so doing during a part of the time involved in this litigation. Practically all of plaintiffs' witnesses testified to the effect that it was customary for the trade to buy wet oil in that vicinity based on the three-point test treated with carbon bisulphide or benzol. That assertion was not disputed. Mr. Tizard, one of plaintiffs' witnesses, testified in that regard: "I believe it is true that whenever wet oil was purchased, it was purchased on a three-point sampling method, and on the net quantity as the result of the benzol test or the carbon bisulphide test." Mr. Powell, another witness for plaintiffs, testified regarding the same subject, "The most universal practice is to pay on the observed gravity. It was universal to make these three-point tests, and to use the method of determining the cut by testing the three-point sample by the carbon bisulphide method. Once in a while they would require the benzol method. I never bought by any other method." There is no evidence to the contrary.

The evidence also establishes the fact that the defendant accounted to plaintiffs for the proceeds of all sales of their royalty oil, tested in that manner, and that it paid for the same according to the agreed standard of market price therefor, except that the stipulated sum of $966.03 was not paid plaintiffs, but is still due and owing from the defendant.

[3] There is no language in this lease which may be reasonably construed to mean that the plaintiffs' one-sixth royalty or portion of the oil produced from the wells on their premises is to be estimated on the basis of "pipeline oil" or clear processed oil free from all impurities and suitable for market. On the contrary, the prime consideration for the lease is the promise of the lessee to "pay to said lessors on account of rent or royalty for the premises, one-sixth (1/6) part of all oil, gas, asphaltum or other hydro-carbon substances extracted and saved from said premises." The decision in the Alamitos Land Company Case construes this very language to mean that the lessee agrees to pay in consideration for the lease one-sixth of the wet oil in its natural condition, with the free water, only, removed. The other conditions of the present lease do not change that covenant. They merely provide for other contingencies, such as the subsequent extracting of gasoline from the natural gas, the processing of the natural oil so as to prepare it for market if that procedure becomes necessary, and the sale of the royalty oil with that of the producer, provided the lessors elect to receive their royalties in cash and authorize such processing and handling of their portion of the oil. This treatment of plaintiff's portion of the royalty oil and gas is to be performed by the lessee at the expense of the lessors. These subsequent provisions of the lease may be readily reconciled with the construction that the plaintiffs' royalty oil is to be determined by ascertaining their portion of the oil in its natural condition, minus the free water therein contained.

[4, 5] Under the provisions of this lease, the plaintiffs were therefore entitled to royalties equivalent to one-sixth of the oil and gas produced, in its natural condition, less the free water which by the custom of the trade is first removed in the ordinary process of "bleeding" the tanks. They also have the option to accept their royalties in cash. The term "oil," as it is used in this lease, must be deemed to have been used and understood to mean the crude oil petroleum well fluid which is produced from the demised premises after the free water is first removed therefrom. Alamitos Land Company v. Shell Oil Company, supra. The royalty oil to which the plaintiffs are entitled under the terms of this lease is therefore one-sixth of the product of the wells in that same condition. The term "royalty," unless it is otherwise defined in the agreement, is equivalent to rental, and is defined as the consideration for the execution of a lease which is payable either in kind or in cash as a stipulated proportion of the petroleum which is produced from the land. Collins v. Lemaster's Adm'r, 232 Ky. 188, 22 S.W.(2d) 567; 2 Thornton on Oil and Gas, p. 644, § 363. Royalty may be payable according to the terms of a contract either in money or in kind by delivery of a specified share of the oil. Homestake Exploration Corp. v. Schoregge, 81 Mont. 604, 264 P. 388.

[6, 7] The plaintiffs may not repudiate the customary method adopted by the trade for testing oil in the vicinity of their property to ascertain the volume and specific gravity thereof, by a mere plea of ignorance of the prevailing usage. The general established custom respecting the conduct of a particular business, trade, or enterprise in the same vicinity is presumed to be known and accepted by the contracting parties with respect thereto, unless the contrary appears. 25 Cal. Jur. p. 420, § 5; section 1655, Civ. Code; Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 P. 817, 32 A. L. R. 1215. In 25 California Jurisprudence, at page 420, it is said in that regard: "Parties who contract as to a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary." In the present case not only was nothing said regarding the existence of this prevailing custom of the trade in that vicinity, but the oil was treated in that manner and accounted for in monthly statements to the plaintiffs for six and a half years without objection. Under such circumstances, it seems unreasonable for the plaintiffs to now plead ignorance of an established custom with respect to the accepted method of testing oil or the asserted inaccuracies of that system particularly in view of the fact that section III, subdivision b, of the lease authorized them, at any time, to inspect the defendant's books, accounts, records, works, tanks, and appliances, and also permitted them to gauge, test, or examine all apparatus and methods

of producing, handling, and marketing oil, gas, and other products of the wells to ascertain the volume, gravity, or value of the same, either personally or with the assistance of agents or experts. To permit this plea of ignorance in the absence of fraud under the circumstances of this case would not only destroy the effect of the presumption of knowledge, but it would also upset established rules of business of the entire industrial world. We are therefore of the opinion the rule with respect to the presumption of knowledge of trade customs should apply in the present case.

The plaintiffs attempt to distinguish the facts of this case from those of the Alamitos Land decision by asserting that there is an omission in the present lease of language contained in that lease with respect to the condition or grade which the royalty oil is required to possess. It is claimed this language of the Alamitos Land Case was controlling on the Supreme Court in construing that lease. The language of the Alamitos Land Company lease, upon which the plaintiffs rely for their asserted distinction, reads:

"The Lessee shall deliver to the Lessor on said demised premises, as royalty hereunder, the equal one-sixth (1/6) of all petroleum oil, asphaltum or other hydro-carbon substances produced and saved from said demised premises by said Lessee, and said Lessor shall have the option to take its royalty in kind, and if it so elects, the same shall be delivered as produced and saved into tanks or other containers maintained upon said demised premises by said Lessee for that purpose, and such royalty oil may be stored without charge in such tanks or containers for a period of not to exceed thirty days, but at said Lessor's sole risk. At said Lessor's option, Lessee will purchase said royalty oil from said Lessor, and shall pay said Lessor therefor the current price paid by the Lessee for oil of like grade and gravity at the wells of production in the same vicinity."

We are unable to draw the distinction between these two leases suggested by the plaintiffs. The provisions of the lease in this case are remarkably similar to those which were involved in the Alamitos Land Case with regard to the condition of the royalty oil, as may be seen by comparing the preceding paragraph of the Alamitos Land lease with the terms of the present lease previously quoted. The only difference in the provisions of these leases, in that regard, is that the Shell Oil Company agreed to store the royalty oil belonging to the Alamitos Land Company in tanks, and purchase the same from the lessor at the market value of other oil of like grade and gravity. It will be observed this is not a specification regarding the condition of the royalty oil in tanks, nor is it a covenant affecting the grade or gravity upon which the lessor's royalty oil is to be determined. Like the lease in this case, there was a total absence of any agreement with respect to the grade or gravity of the royalty oil. It was for that reason the Supreme Court held that the term "royalty oil" meant crude petroleum from which the free water had first been removed.

The plaintiffs insist that the present lease is different from that which was involved in the Alamitos Land Case because section III, subdivision k, of this lease contemplates the dehydration and treatment of the oil to purify it for marketing purposes; that the Alamitos lease does not contain this clause; and that the language of this lease means the royalty oil which is to be delivered to the lessors must therefore be of a grade and gravity which renders it suitable for market. It is suggested this construction of the lease is recognized by the defendant in its letter to one of the plaintiffs, dated September 9, 1924, as follows:

"Referring to the 'Vollmer-Meyers' oil lease in the Huntington Beach field, now being operated by this company and of which you are one of the owners.

"You are hereby advised that the oil now being produced from this lease contains such quantities of water and other foreign substances and is of such character as to render it necessary to treat same to make it marketable. The undersigned has erected a plan in the Huntington Beach oil field for the treatment of its own oil. The lease provides that in the event the Lessee erects a plant for the purpose of treating such oil, it will, upon request, transport and treat the royalty oil of the Lessors together with its own, charging therefor the actual cost of such transportation and treatment.

"If you desire us to transport and treat your oil with ours please sign the enclosed request and return same to us at once.

"As there is no market for this oil until it has been treated, we will, until advised by you to the contrary, transport and treat your oil with ours, charging you your proportion of the actual cost therefor."

We do not so construe the lease. That provision upon which the plaintiffs rely merely covenants that the lessee will, upon request of the lessors, when it becomes necessary to do so, "treat" the royalty oil together with its own portion of the petroleum so as to prepare it for market. This clause reads:

"That it (the lessee) will, in the event it becomes necessary to treat any of the oil produced on said premises to make same marketable, and in the event the lessee erects a plant for that purpose, upon request, treat the royalty oil of the lessors together with its own, charging therefor only the net cost of such treatment."

This paragraph does not make it mandatory for the lessors to have their royalty oil so treated. That process is merely optional on their part. If they do elect to have it done, they must pay the defendant the cost of such treatment. That clause contemplates that the lessors already have a quantity of royalty oil distinct from the portion which belongs to the lessee, and because the lessors have elected to receive their oil in cash, in the event it is not marketable in its natural state, the lessee agrees to treat it with its own oil so as to make it suitable for market if the lessors so desire and subject then to the payment of the cost thereof. This clause applies to covenants and conditions distinct from and subsequent to the accruing of plaintiffs' royalty oil to which they are entitled. This construction of the lease is reinforced by the last sentence of the clause above mentioned, which provides that the lessors shall pay the lessee for processing their portion of the oil "the net cost of such treatment." If the quantity of the lessor's royalty oil were not already deemed to have accrued by virtue of section I, subdivision g, of the contract, it would be unjust and senseless to charge them for processing it. Nor is the language of the above-quoted letter inconsistent with this construction of the lease, for it specifically says, "If you desire us to transport and treat your oil with ours please sign the enclosed request and return same to us at once." The last paragraph of section III, subdivision g, of this lease confirms this construction by providing that, "The lessee shall have the right to handle, market, sell and/or otherwise dispose of said royalty oil, with and as a part of the products belonging to the lessee, and pay to the lessors in money, the proceeds thereof, less cost of handling after leaving tank or container." Section I, subdivision 1, of this lease also contemplates that the royalty oil to which the lessors are entitled is the natural product with the free water eliminated, for it provides: "That it (the lessee) will at the request of said lessors, market in its original state the royalty oil or gas belonging to them, along with and upon the same terms as it markets its own oil or gas produced upon said premises." We are therefore of the opinion there is nothing in the present lease in that regard which distinguishes it from the lease which was construed by the Supreme Court in the Alamitos Land Case so as to define royalty oil to mean the crude petroleum in its natural state with the free water first removed therefrom.

The case of Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668, which is relied on by the plaintiffs in this case, furnishes no aid in the construction of this lease. In that case the consideration for the execution of the oil lease was one-sixth of the "net proceeds" of the sales of the products of the well. The court merely held that the payment to lessors of an amount equal to one-sixth of the prevailing market price of the products did not comply with the lease. In the present case the lease does not designate the royalties as one-sixth of the net proceeds of sales of oil, but, on the contrary, it provides for one-sixth of the oil, gas, asphaltum, or other hydro-carbon substances extracted and saved from the premises.

[8] The numerous other cases cited by the plaintiffs are likewise distinguishable from the facts of this case. This case must be determined primarily on the construction of the language of the lease, and many of the cases cited are not helpful in that regard. When an appeal is to be determined by a construction of the unambiguous language of a lease or other document as distinguished from extraneous evidence of the intention of the contracting parties, or oral evidence of the meaning of technical terms, or the existence of a controlling trade custom, the appellate court is not bound by the construction of the document by the trial court, but must, itself, construe the instrument as a matter of law. Scudder v. Perce, 159 Cal. 429, 433, 114 P. 571.

[9, 10] The plaintiffs have appealed from that portion of the judgment represented by the stipulated sum of $13,382.77

which was allowed the defendant under the terms of the contract as "cost of extraction" of gasoline from the lessors' proportion of the natural gas produced. It is contended the court wrongfully included in this term the items of "depreciation, insurance, administration expense, plant salaries and expense, and taxes" which were included as necessary costs thereof. The amount of such costs is not in dispute, but, on the contrary, the above sum was stipulated to be correct provided the various items are determined to have been properly included in the term "cost of extraction."

Our attention is not called to any evidence in the record indicating that the court allowed defendant as "cost of extraction" more than the plaintiffs' fair proportion of the total expense which was incurred by it in separating the gasoline from the natural gas produced so as to prepare it for market.

We are of the opinion the court properly included the items of depreciation, insurance, administration expense, plant salaries, and expense and taxes on account of processing and marketing plaintiffs' proportion of the product as "cost of extraction." The terms of the contract indicate that the word "cost" as it was used in that clause was intended by the contracting parties to be construed in its ordinary meaning and not in some technical or unusual manner. It is the accepted rule of construction that words which are used in a contract are to be interpreted in their ordinary and popular sense, rather than in a strictly technical manner unless it appears that the parties used them in a technical sense or according to peculiar usage. Section 1644, Civ. Code; 13 C. J. p. 531, § 489; 6 Cal. Jur. p. 284, § 175; Schlitz v. Akers, 210 Cal. 490, 292 P. 463. From an examination of the contract as a whole, it seems apparent that the lessee agrees to pay the lessors as a consideration for the lease "on account of rent or royalty for the premises, one-sixth (1/6) part of all oil, gas, asphaltum or other hydro-carbon substances extracted and saved from said premises"; that it will "store, free of charge, in tanks or reservoirs upon the demised premises or convenient thereto, at its own expense, for the period of thirty (30) days, all royalty oil deliverable hereunder to the lessors, without cost or charge of any kind to said lessors"; that it will, at the request of lessors, "transport any royalty oil or gas belonging to the lessors with the oil or gas belonging to it, and will charge therefor the actual proportionate cost of such transportation"; and that it will "pay to the lessors for all gasoline extracted from the natural gas produced on said premises, one-sixth (1/6) part of the proceeds received from the sale thereof after deducting the cost of extraction and for all gas produced, saved and sold off the premises by the lessee; provided, however, that nothing herein contained shall be deemed to obligate the lessee to produce, save, sell, treat or otherwise dispose of gas from said premises or any well thereon." From the preceding quotations, it seems clear that the lessee was not necessarily required to process and extract gasoline from the lessors' proportion of the oil mining project on their land, but when that was done, and their royalty proportion was so treated and marketed, the lessee was entitled to deduct from the proceeds of such sales the lessors' fair proportionate share of the cost thereof. This was done, and the court properly so found.

It does seem, as contended by the defendant, that the estimated volume, gravity, and market value of royalty oil for a period of six and a half years past, based solely upon a different method of testing the oil which was subsequently adopted and applied to other oil which may have been in a different condition, may be too speculative and uncertain. But in view of our construction of the lease and what we have previously said, it becomes unnecessary to pass on that question. For the same reasons, it is unnecessary to pass on the defendant's other contentions that the court wrongfully allowed interest on an unliquidated sum without a previous demand therefor; that the plaintiffs' cause is barred by laches and by the statute of limitations; and that they are estopped from maintaining their action by the doctrine of accord and satisfaction and upon the theory of an account stated.

It is, however, stipulated that the defendant owes plaintiffs on account of royalty oil accruing to them during the period of time which is involved in this litigation the sum of $966.03.

That portion of the judgment from which the plaintiffs appeal is affirmed. The appeal of the defendant is sustained, and the judgment awarding plaintiffs the sum of $116,710.39 is reversed, and the court is directed to render judgment against the defendant, in lieu thereof, for the sum of $966.03. The defendant is entitled to its costs on appeal.

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9 Cal.App.2d 545

RYDER v. YOUNG et al.

Civ. 1710.

District Court of Appeal, Fourth District, California.

Oct. 17, 1935.

Hearing Denied by Supreme Court Dec. 16, 1935.

1. **Executors and administrators** 🔑59
In action by executor to quiet title to realty which decedent had conveyed to sister, evidence *held* to sustain finding that as between decedent and sister real ownership had not passed to sister.

2. **Escrows** 🔑8(1)
Escrow agent is agent of both parties to transaction, and knowledge possessed by him is to be imputed to each of such parties.

3. **Executors and administrators** 🔑59
In action by executor of estate to quiet title to realty which decedent had conveyed to sister and which sister through an escrow arrangement had conveyed to a third party, evidence as to knowledge possessed by escrow agent and actual knowledge possessed by third party *held* to support finding that such party had notice that sister was not real owner of property and that third party consequently was not innocent purchaser for value.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by B. E. Ryder, as executor of the estate of Carrie E. Wilcox, deceased, against George W. Young, S. F. Margozewitz, and Mrs. S. F. Margozewitz, his wife, and another. From an adverse judgment, S. F. Margozewitz and Mrs. S. F. Margozewitz, his wife, appeal.

Affirmed.

Edw. F. Wehrle, Anderson & Anderson, Earl E. Johnson, Arch H. Vernon, and Gilbert E. Harris, all of Los Angeles, for appellants.

Goodspeed, Pendell & McGuire, of Los Angeles, for respondent.

BARNARD, Presiding Judge.

This is an action to quiet title to a lot in New Vernon, in Los Angeles county.

On March 1, 1917, Carrie E. Wilcox, who then owned this lot, executed, acknowledged, and recorded two deeds. The first of these described this lot and purported to convey the same to the defendant George W. Young. The second, recorded one minute after the first, purported to convey to Bertha D. Ireland, a sister of Mrs. Wilcox, "all my real property, wheresoever the same may be situate." The record remained in that condition until after the death of Mrs. Wilcox, which occurred about 4 o'clock a. m. on January 8, 1929. About 9 a. m. on that day, and before she had learned of her sister's death, the defendant Ireland executed and acknowledged a quitclaim deed conveying her interest in the property to Mrs. Wilcox. About fifteen minutes later, she delivered this deed to B. E. Ryder, who had been named executor in Mrs. Wilcox's will. Ryder was appointed executor of the estate of Mrs. Wilcox by the superior court of Los Angeles county on March 15, 1929, and this quitclaim deed was recorded in the following June.

On October 19, 1929, attorneys for Mrs. Ireland filed an action in Los Angeles county seeking to quiet her title to this lot and naming George W. Young and B. E. Ryder, executor of the estate of Jessie Wilcox, deceased, as defendants. The complaint was verified by Harold E. Leddy as one of Mrs. Ireland's attorneys. Summons was issued but was never served on either of the defendants named. In the latter part of 1929, Leddy, acting as attorney for Mrs. Ireland, arranged to sell this lot to the defendant S. F. Margozewitz, who started an escrow with the First National Bank of Vernon, where he did business, at some time prior to December 9, 1929. Both he and Mrs. Ireland gave the bank written escrow instructions under which he was to pay $4,500 for the property and was to receive a grant deed from Mrs. Ireland with an owner's policy of title insurance from a title company. He paid a part of the purchase price into the escrow, a portion of which was used in attempting to clear the title. Among other things, $250 was paid to George W. Young for a quitclaim deed to Mrs. Ireland, which was dated January 17, 1930. The escrow agent secured a preliminary report from a title company stating that the title was "apparently vested in George W. Young," and that a quiet title action instituted by Bertha D. Ireland was pending in the superior court. A grant deed from Bertha D. Ireland to S. F. Margozewitz was acknowledged on December 3, 1929, before a Philadelphia notary public and was recorded February 11, 1930, and the escrow was closed. Mrs. Ireland, who at all times material here was a resident of Philadelphia, was not in California during the time the sale of the property was in progress and the entire matter was handled for her here by her attorney, Leddy.

In this action which followed the court found upon ample evidence that the deed of March 1, 1917, from Carrie E. Wilcox to George W. Young was, in fact, an equitable mortgage. The court also found that Carrie E. Wilcox was the owner of the property up to her death and that the same now belongs to her estate; that George W. Young, in consideration of the payment to him by Bertha D. Ireland of his mortgage indebtedness in the sum of $250, executed and delivered to her a quitclaim deed releasing all of his rights in the premises; that the said Bertha D. Ireland was at that time fully advised and had actual knowledge as to the rights of Young and of the fact that he held the record title to the premises as security only for the payment of the indebtedness; that at the time the property was sold to S. F. Margozewitz for $4,500 the same was of the reasonable value of $6,600; and that at the time he purchased the property the said S. F. Margozewitz had notice and was chargeable with constructive knowledge of facts and circumstances which should have put a reasonable person on inquiry and from which inquiry he would have ascertained that Bertha D. Ireland acquired no title to the premises through the quitclaim deed she received from George W. Young and that the premises were, in fact, owned by the estate of Carrie E. Wilcox, deceased. Judgment was entered in favor of the plaintiff, and the defendants Margozewitz have appealed.

Appellants' main contentions are that the evidence is not sufficient to sustain the findings to the effect that title to this property remained in Carrie E. Wilcox and her estate, and to the effect that the appellants were chargeable with notice as to the rights of the respondent. The appellants contend that since the deed to Young of March 1, 1917, was merely a mortgage, title passed to Bertha D. Ireland under the deed to her of that date, where it has remained ever since. In this connection it is argued that the description in the deed last referred to is sufficient since it covers all the property the grantor had; that acceptance of the deed and a consideration must be presumed, the deed having been recorded; and that the deed from Mrs. Ireland to Mrs. Wilcox, having been executed and delivered after the death of Mrs. Wilcox, is not only void as a legal instrument, but cannot be considered for any purpose.

In our opinion, the evidence sustains the trial court's findings and conclusion to the effect that the title to this property did not pass to Bertha D. Ireland through the deed executed by Carrie E. Wilcox on March 1, 1917. Much argument is presented by both parties on the question as to whether the description in this deed is sufficient to pass title to this property and the following cases are cited: Brusseau v. Hill, 201 Cal. 225, 256 P. 419, 55 A. L. R. 157; Pettigrew v. Dobbelaar, 63 Cal. 396; Oatman v. Niemeyer, 207 Cal. 424, 278 P. 1043; Saterstrom v. Glick Bros. Sash, Door & Mill Co., 118 Cal. App. 379, 5 P.(2d) 21. Assuming that the description in this deed was sufficient to pass title in a proper case and especially where the equities were in favor of the grantee, other important questions remain as to whether that deed was intended to pass title, whether there was a consideration therefor, and whether there was an acceptance on the part of the grantee named therein. The appellants argue that the presumption in all these respects is in their favor, since the deed was recorded and since there was a notation thereon that it was recorded at the request of the grantee. Any such presumptions seem to have been pretty thoroughly overcome by the evidence.

[1] It appears that Mrs. Wilcox deeded this property to her sister fearing that her stepdaughters would claim it and desiring to retain it for her support in her old age. While some hearsay evidence was admitted, the following facts are sustained by competent evidence: Mrs. Wilcox continued to claim to be the owner of the property up to the time of her death and Mrs. Ireland asserted no claim thereto, directly or indirectly, while her sister was alive. While the property was

a vacant lot, an ornamental signboard was maintained thereon by Foster & Kleiser for a number of years before the death of Mrs. Wilcox under a written lease from her dated in 1927, but reciting that it ran for ten years from and after 1925, the rental being collected by Mrs. Wilcox. After her death, tax receipts for each of the years 1917 to 1928, inclusive, with the exception of the years 1918, 1919, and 1925, were found in her effects. On December 17, 1918, Mrs. Wilcox, who was then sick in a hospital, sent a telegram to her sister in Philadelphia saying, "Please sign deed at once as you promised and return today. Cash all gone." Instead of answering this telegram direct, Mrs. Ireland wrote to Dr. Ryder as follows: "I just received your letter regarding my sister, Mrs. Carrie Wilcox, and wish to thank you for it. As I have before written you, I am not able to give any more than ten dollars per week, which I am sending at present. I mailed her a check on December 11th to the California hospital for twenty dollars, which I presume she received. I am perfectly willing to sign a deed to my sister for any property she may have in California which she has placed in my name. She must realize that I do not know what property, if any, she has put in my name, as I have no papers in the matter. I would suggest that she get a trust company to prepare a deed from myself to her for the property, which I will sign and properly execute and return, after which she may sell the property or do with it as she pleases. So for as I can understand, this property, about which she speaks, must be her only remaining asset, and I want to make myself perfectly clear, that if she does sell and thereby exhaust her last possible channel from which to get any money, I expect to discontinue my payments of ten dollars per week, as I feel, if properly managed, the cash she will receive from the sale will be ample to take care of her. I am enclosing a telegram which I received Saturday morning, but did not reply as this letter to you will explain and you can show or read it to her. My sister has never told me anything about her affairs or business, so, of course, I do not know anything." After receiving that letter, Dr. Ryder had a quitclaim deed prepared conveying the property from Mrs. Ireland to Mrs. Wilcox, which he sent to Mrs. Ireland at Philadelphia for her to execute. Mrs. Ireland did not immediately execute the same, but soon thereafter came to California, arriving shortly before Mrs. Wilcox died. Dr. Ryder testified that on the afternoon before Mrs. Wilcox died, Mrs. Ireland came to his office and he told her at which hospital Mrs. Wilcox could be found. Later that day, this witness heard a conversation between Mrs. Wilcox and Mrs. Ireland in which Mrs. Wilcox asked her sister if she had executed the paper which had been sent to her. Mrs. Ireland replied: "Not yet." Mrs. Wilcox then said: "I don't see why you haven't done that because you promised to and I need the money very badly." Mrs. Ireland then replied: "I will go right down and fill it out right away. * * * I don't care what you do with your property, you can give it to any Tom, Dick or Harry, I did not know you had any property in my name and if you have any of it in my name I will be glad to turn it back to you. I will go right down town and do it now." The next morning Mrs. Ireland signed and acknowledged the quitclaim deed conveying the property to Mrs. Wilcox, and delivered the same at Dr. Ryder's office without knowing that her sister had died a few hours before.

In her deposition, which was admitted in evidence, Mrs. Ireland testified that she had lived in Philadelphia for about forty years; that she had never had any business dealings with George W. Young; that he had never deeded the property here in question or any other property to her; that she had never paid any money through her attorney or otherwise for this lot; that she had not seen the lot and did not know where it was or anything about it; that she had never paid any money to George W. Young or had anything to do with him; that she sold the lot to S. F. Margozewitz; that she did not know what the selling price was or anything about the transaction as it was all handled by her attorneys, mostly by Mr. Leddy; that she did not recall ever receiving a deed to the lot from George W. Young; that she knew nothing about its value or what its value was at the time she sold it to Margozewitz; that she did not know whether or not that was a cash sale; and that she did not know whether or not the sale was handled through an escrow. When asked if she ever paid any taxes on the lot, she replied: "I gave the money to my sister and she paid them. I didn't pay them direct." She testified that she did not know what the taxes amounted to; that her sister had written saying she needed money for taxes, but did not state the amount due; that she had no recollecion of how much she had sent for taxes and did not know the amount of any assessments; that she could not remember how much money she had sent at any time or altogether; that she had never paid her sister anything for the lot; that she received a deed in 1917, but that she did not have it recorded and did not know whether it had ever been recorded; and that her sister asked her to give her a deed the night before she died and she told her she would do so the following morning.

It appears from the evidence that Mrs. Ireland knew practically nothing about this transaction and that the sale of the lot and the matter of attempting to establish title in Mrs. Ireland were handled by her attorney Leddy. In her escrow instructions to the bank Mrs. Ireland stated that the property was being sold to Mr. Margozewitz for $4,500; that they were authorized to secure an owner's policy of title insurance "in which I guarantee to be able to show the above described property vested in my name"; that the property "is now clouded by instruments of record," but that the title was being cleared by her attorneys through a quiet title action then pending; that the escrow was to continue in force until thirty days after said quiet title action was completed; and that the escrow agent was authorized to pay to Mr. Leddy 25 per cent. of the net proceeds of the selling price being paid by Mr. Margozewitz.

George W. Young placed a quitclaim deed in the escrow. In his instructions he stated that he was to receive $250 from Mrs. Ireland's share of the net proceeds of the escrow; that his deed was "to be considered a final disposition of the property in any event"; that he would sign any other paper necessary to carry out his agreement with Mrs. Ireland and Mr. Leddy; that he agreed to the dismissal of the quiet title action then pending; that he would deliver, if demanded, a disclaimer of any interest in the property; that he waived any and all claims against Mrs. Ireland and the "estate of Carrie Wilcox"; and that "in the event the present action goes to trial, I will appear as a witness and do all in my power to assist Mrs. Ireland or her successors in obtaining a clear title to this property." Mr. Young testified at the trial that before putting his quitclaim deed in escrow he told Mr. Leddy that the deed from Mrs. Wilcox which he received in 1917 was given to him as security for money he had loaned her.

While the escrow was pending, Mr. Leddy wrote to the escrow agent as follows: "I wish to express to you my sincere appreciation of the very intelligent assistance you gave me in dealing with George W. Young yesterday. I feel that he is going to accept our offer and that the deed will soon be in your possession. I believe it advisable to place these deeds on record and to use every effort to obtain guaranty of title without the necessity of completing the present action to quiet title. The chain of title from Wilcox to Young to Ireland to Margozewitz cannot be in any manner attacked by the estate of Wilcox. If any references are made to the deed from Ireland to Wilcox, the point should be stressed that the original deed from Wilcox to Ireland conveyed title only to such property as Mrs. Wilcox then possessed, and at the time of recordation and probably at the time of delivery of this original Wilcox to Ireland deed both title and possession were in George W. Young. * * * I would further suggest that Mrs. Ireland be requested to give additional instructions to cover the Young matter, and that she confirm the instructions of Mr. Conwell relative to the costs, expenses, and my fee. If Mr. Margozewitz can be pursuaded to accept a guaranty which would insure the property to be in his name free of all claims, except such as the Estate of Wilcox might prove to have, I would agree after the dismissal of the present action to bring an action in his name, without charge to him, against the Executor of the Wilcox Estate to clear this apparent flaw in his title. With an innocent purchaser as plaintiff, and with only the Estate as defendant, the case would present no difficulties. This would enable us to make a disposal of the purchase price and would simplify matters considerably."

It fully appears that Mrs. Ireland and her agents, Leddy and the bank, had full knowledge of the deed to Mrs. Wilcox which was executed and delivered after her death by Mrs. Ireland, of the action brought by Mrs. Ireland to quiet title to this property, of the pendency of the estate proceedings, and of the fact that the estate of Mrs. Wilcox claimed to be the owner of this property. While the escrow was pending, Mrs. Ireland's attorney in Philadelphia wrote a number of letters to the escrow agent, all of which were headed: "Re: Estate Carrie Wilcox." It also appears that Mrs. Ireland's attorney Leddy, after securing the quitclaim deed from George W. Young, abandoned the quiet title proceeding and dismissed the same without serving the executor of Mrs. Wilcox's estate and persuaded the title company that the deed executed by Mrs. Ireland after the death of her sister was of no effect. While this deed was not sufficient to pass a title, it was not without an important effect, in connection with other evidence, in showing the actual situation between the parties. Without knowing anything about the value of the property, Mrs. Ireland was willing to leave the matter entirely in the hands of her attorney and take what she could get less a fee of 25 per cent. Her own attorneys in Philadelphia handled the matter as something coming to her from the estate of her sister. While Mrs. Ireland had directed that the escrow remain open until the quiet title action was completed, this was not done and, apparently, she did not even know that that action was dismissed and the matter closed in another way. As between the original parties themselves, we think the court's finding that the real ownership did not pass to Mrs. Ireland is fully sustained by the evidence.

[2, 3] It is earnestly contended by the appellants that, irrespective of the situation as between Mrs. Ireland and Mrs. Wilcox, they are innocent purchasers for value who relied only on the record title and who had no knowledge, constructive or otherwise, of any fact or circumstance which should have put them upon their guard or cause them to make any investigation as to the facts. This contention is not borne out by the record. The escrow agent had full and complete knowledge of practically all of the facts which have been mentioned, including the facts that a quiet title action had been started against the estate of Mrs. Wilcox; that Young did not claim to own the property; that the deed from Mrs. Ireland to Mrs. Wilcox was on record; that the property was leased to Foster & Kleiser for billboard purposes and the rental was to be prorated; and that the property was being claimed by the estate of Mrs. Wilcox. It is well settled that an escrow agent is the agent of both parties to such a transaction. Shreeves v. Pearson, 194 Cal. 699, 230 P. 448. And further, that the knowledge possessed by such an agent is to be imputed to each of the parties to the escrow. Early v. Owens, 109 Cal. App. 489, 293 P. 136; Smith v. Brown, 1 Cal. App. (2d) 492, 36 P.(2d) 1081.

The record also shows that the appellant S. F. Margozewitz had actual knowledge of facts which should have put him upon his guard and which were sufficient to place upon him the duty of making an investigation which would inevitably have led to the discovery of the other facts referred to. He was paying $4,500 for property which the court found was then worth $6,600. He himself started the escrow and agreed to pay all of the escrow agent's expenses if the escrow was not completed. He knew that the signboard was on the property and stipulated that the rental therefor was to be prorated. While he testified that he knew nothing about the former owner of the property, he told one of the witnesses that the property could be purchased cheap as the old lady who owned it was dead. Mr. Leddy testified that he discussed with the escrow agent, the bank, the matter of the deed from Mrs. Ireland to Mrs. Wilcox being on record. He also testified that while the escrow was pending he had a talk with Mr. Margozewitz in which they discussed the fact that there was a deed on record from Mrs. Ireland to Mrs. Wilcox; that they had anticipated holding up the escrow until that matter was cleared up; that Mr. Margozewitz was willing to leave his money in escrow until this matter could be cleared up; that in this conversation he told Mr. Margozewitz that he had convinced the title company that the original deed from Wilcox to Ireland was valid and that the deed from Ireland to Wilcox was invalid; and that this pleased Mr. Margozewitz. In fact, Mr. Margozewitz was so much pleased that the next day he gave the escrow agent an order to advance Mr. Leddy $200 on his fee, authorizing them to deduct the same from his deposit in the event the escrow was not closed. In our opinion, the knowledge possessed by the escrow agent and the actual knowledge possessed by Mr. Margozewitz was sufficient to support the court's finding that he had notice, actual and constructive, and that he was not an innocent purchaser for value. That he chose to rely upon a policy issued by a title company is something with which the respondent is not concerned and is no defense in this action.

Other points are raised by the appellants, including a large number of objections to the admission of evidence, all of which need not be considered under our view that the essential findings are supported by the evidence.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

9 Cal.App.2d 490

UNIVERSAL PICTURES CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 10386.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1935.

Hearing Denied by Supreme **Court** Dec. 12, 1935.

1. Master and servant 🔑1

Individuals whose principal efforts are directed to accomplishment of some mental task, such as those of ministers of the gospel, lawyers, doctors, and teachers, are not "laborers."

[Ed. Note.—For other definitions of "Laborer," see Words & Phrases.]

2. Statutes 🔑188

Words in statute should be given their ordinary meaning and receive sensible construction in accord with common understanding of men (Civ. Code, §§ 13, 3542).

3. Statutes 🔑205

Language of statute must be given reasonable interpretation, and statute as whole must be so construed and, if possible, made compatible with common sense and dictates of justice (Civ. Code, §§ 13, 3542).

4. Arbitration and award 🔑3

Motion picture actor, who was to receive a salary of $1,000 per week in production of photoplay, *held* not a "laborer" within statute providing that statutes with reference to arbitration shall not apply to contracts pertaining to labor, and hence arbitration award pursuant to contract between parties was binding on actor (Code Civ. Proc. §§ 1280, 1287).

Word "labor," within meaning of arbitration statute (Code Civ. Proc. § 1280), applies to that kind of human energy wherein physical force, or brawn and muscle, however skillfully employed, constitute principal effort to produce given result, rather than where result to be accomplished depends primarily upon the exercise of the mental faculties.

[Ed. Note.—For other definitions of "Labor," see Words & Phrases.]

◆

Petition by the Universal Pictures Corporation for a writ of mandate directed to the Superior Court of the State of California in and for the County of Los Angeles.

Judgment making alternative writ permanent.

Hearing denied by Supreme Court; SEAWELL, LANGDON, and THOMPSON, JJ., dissent.

Loeb, Walker & Loeb, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

HOUSER, Presiding Justice.

The essential facts herein are that one Hymer entered into an agreement with Universal Pictures Corporation, by the terms of which the former was employed as an actor or "artist" by the latter in its production of a "photoplay"; and in which employment Hymer was to receive a salary of $1,000 per week. Among the terms of the agreement was the following provision with respect to the settlement of any disagreement that might arise between the parties, to wit: "Should any dispute or controversy arise between the parties hereto with reference to this contract or the employment herein provided for, such dispute or controversy shall be referred for determination to a committee consisting of five foundation members of the Actors' Branch of the Academy of Motion Picture Arts and Sciences, which committee is to be selected by the Executive Committee of the Actor's Branch of said Academy of Motion Picture Arts and Sciences. Either party to such arbitration may appeal from the decision rendered by such committee, and in such event the dispute or controversy between the parties hereto shall be determined by the Conciliation Committee of said Academy of Motion Picture Arts and Sciences. Any arbitration hereunder shall be conducted in accordance with the by-laws of said Academy of Motion Picture Arts and Sciences, and in accordance with such rules as may from time to time be formulated by said Academy of Motion Picture Arts and Sciences."

Such a "dispute or controversy" having arisen between the parties, at the instance of Hymer the matter was duly referred to a committee, as provided in the agreement, with the result that said committee made its award to the effect: "That complainant, Warren Hymer, take nothing on his claim and that respondent, Universal Pictures Corporation, is not obligated or indebted to complainant in respect of the matters in controversy."

Thereafter, in accordance with the provisions of section 1287 of the Code of Civil Procedure, Universal Pictures Corporation presented its application to the superior court "for an order confirming the award." Following a hearing upon said application for the asserted reason that the court was without jurisdiction in the premises, the said court made its order by which the application was denied. Thereupon, in pursuance of a petition presented herein by Universal Pictures Corporation, from a consideration of the statutes applicable in such cases, and it appearing that the right of appeal from such order by Universal Pictures Corporation was at least questionable, this court caused its alternative writ of mandate to issue by which, in effect, the said superior court was directed either to make and enter its order by which said award would be confirmed, or failing in that regard, that it show cause why such an order should not be made and entered. The respondent has demurred to, but has not answered said petition.

The principal question presented by the parties herein relates to the construction that, in the circumstances and facts herein, should be placed upon the language that appears in section 1280, of the Code of Civil Procedure, to the effect that the provisions of the several statutes with reference to arbitration "shall not apply to contracts pertaining to labor"; that is to say, on behalf of respondent, it is contended that the purpose and intent of the Legislature in enacting such statutes was that they should have no application to a controversy that might thereafter arise from a contract that might involve the payment of compensation for the performance of services of any kind or character; and on behalf of the petitioner, it is urged that a fair construction of the questioned language of the statute impels the conclusion that one who occupies a position such as was occupied by Hymer is not to be regarded as a "laborer," and, consequently, as between him and his employer, that the several statutes that relate to "arbitration" are effective and binding upon the respondent court as they may affect its duty in the premises.

[1] In that connection, considering the very large number of cases that heretofore have been decided throughout the United States wherein was involved the question of what constituted "labor," or who, under the provisions of the various statutes that relate to a claim that may arise from a statutory right of lien, or preference by a workman for wages theretofore earned by him, or to immigration laws, or to statutes of exemption from execution of judgments, etc., were "laborers," the authorities cited to this court by the respective parties to this litigation, although not numerous, yet, taken together with others, particularly those that are digested under the title of "Labor," in the several editions of Words and Phrases, are illustrative of the fact that unanimity in conclusion regarding the point here at issue does not exist; but to the contrary, such authorities demonstrate that the decisions of one jurisdiction, as compared with those of another, are not only in conflict one with the other, but that as well, as a whole, they serve but to create a confusion with reference to a settlement of the precise question here under consideration. However, with but few exceptions, it seems to be generally conceded, that individuals whose principal efforts are directed to the accomplishment of some mental task, such as those of ministers of the gospel (Church of Holy Trinity v. U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226); lawyers (Latta v. Lonsdale [C. C. A.] 107 F. 585, 52 L. R. A. 479; Gay v. Hudson River E. P. Co. [C. C.] 178 F. 499); doctors (Weymouth v. Sanborn, 43 N. H. 171, 80 Am. Dec. 144); teachers (School District v. Gautier, 13 Okl. 194, 73 P. 954; Tatsukichi Kuwabara v. U. S. [C. C. A.] 260 F. 104; Lesuer's Case, 227 Mass. 44, 116 N. E. 483, L. R. A. 1918F, 197); or actors (Wirth v. Calhoun, 64 Neb. 316, 89 N. W. 785; In re Ho King [D. C.] 14 F. 724); or those persons generally known and recognized as professional men or women, even though in its broad sense perform "labor," are not to be, nor should be, classified as "laborers." That such a conclusion is in accord with the popular, everyday notion of what constitutes "labor"

is so well recognized and attested as a fact that its existence needs no illustration; but it is common knowledge that the "pick-and-shovel" man, or even the skilled mechanic, regards as ridiculous the suggestion that any so-called "white collar" individual ever performs any real labor; and the same idea, perhaps to a somewhat lesser degree, prevails as to a subordinate clerk in comparison with a high-salaried executive, or a man in any well-recognized professional employment; and to make use of an example that strikes nearer home, to the "man on the street," the suggestion that a judge ever "labors" is simply absurd.

[2] Reverting to the particular question here under consideration, it may be well to remember that, in construing the language of a statute, it is a universal rule that, excepting when clearly otherwise intended or indicated, words in a statute should be given their ordinary meaning and receive a sensible construction in accord with the common understanding of men. Dependent upon ample authority, and perhaps more accurately expressed, the rule is stated in 23 California Jurisprudence, 749, as follows: "* * * words of a statute * * * are to be interpreted according to their common acceptance, i. e., they will be deemed to have been used and will be read and understood in their usual, natural, ordinary and popular sense * * * unless they have a well-understood technical meaning, * * *" etc.

Section 13, Civil Code, provides: "Words and phrases are construed according to the context and the approved usage of the language."

[3] Section 3542 of the same Code requires that "interpretation must be reasonable"; and with relation to the construction that should be placed upon the language contained in a contract, section 1644 of that Code provides that "the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." "And it has been decided, not only that the language of a statute must be given a reasonable interpretation, but that every statute as a whole must be so construed, and thus, when opportunity arises, made compatible with common sense and the dictates of justice." 23 Cal. Jur. 722. And it has been repeatedly held that in construing a statute, courts are not always to be governed by the exact phraseology and literal meaning of every word or phrase employed. 23 Cal. Jur. 735.

[4] In the instant matter, it therefore becomes clear that, notwithstanding the broad meaning that may or might be attributed to the word "labor," since no rule of construction of the statute in which it is employed demands that the word "labor" as used therein be accepted and read otherwise than as it is commonly understood, its general meaning should be restricted. In its present connection, the meaning that should be attributed to the word is that it applies to that kind of human energy wherein physical force, or brawn and muscle, however skillfully employed, constitute the principal effort to produce a given result, rather than where the result to be accomplished depends primarily upon the exercise of the mental faculties.

Comparatively few men are actors or "artists" who earn or are capable of earning $1,000 per week. Until within recent years, that sum represented more money per week than was paid to the President of the United States as salary for his services. Although in the course of his duties as an actor or "artist," Mr. Hymer may perform that which, considered from his viewpoint, may be "labor," to the lay mind, to all practical intents and purposes, the exercise of his talents and genius as an "artist" may not be so classified. Essentially, in the contemplation of the ordinary individual, the work done by an actor or "artist" is not that of a "laborer," but rather is that of a man engaged in a professional pursuit.

It follows that the alternative writ hereinbefore issued by this court should be made permanent; that is to say, that in accordance with the statutes of this state, the respondent herein be and it is directed to make and enter its order by which the arbitration award to which reference hereinbefore has been had, be confirmed. It is so ordered.

We concur: YORK, J.; DORAN, J.

9 Cal.App.2d 569

MELONE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 10185.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1935.

1. **Master and servant** 🔑375(2)

Where employee, engaged by peddler of fruits and vegetables to make house to house canvass, was injured when peddler's truck was struck by automobile while returning to peddler's home with unsold produce, employee *held* engaged in employment at time of injury.

2. **Master and servant** 🔑367

Where peddler of fruits and vegetables engaged boys to make house to house canvass, fixed price at which produce should be sold, and required unsold portion to be returned to him with proceeds of sales and paid boys commissions, boy injured while engaged in such work *held* not "independent contractor" but "employee" protected by Compensation Act (Gen. Laws 1931, Act 4749, § 7; Gen. Laws Supp. 1933, Act 4749, § 8).

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

3. **Master and servant** 🔑362

Where employment of boy engaged by peddler of fruits and vegetables to assist in making house to house canvass was of indefinite duration and it did not appear that work of boy was to be completed within 10 days or that his total remuneration consisting of commissions on sales would be less than $100, employment *held* not "casual" within Compensation Act (Gen. Laws 1931, Act 4749, § 7; Gen. Laws Supp. 1933, Act 4749, § 8).

[Ed. Note.—For other definitions of "Casual Employment," see Words & Phrases.]

4. **Master and servant** 🔑367

Fact that compensation of injured employee was paid by way of commissions instead of salary *held* not material on right to compensation under Compensation Act (Gen. Laws 1931, Act 4749, § 7; Gen. Laws Supp. 1933, Act 4749, § 8).

Proceedings upon the Workmen's Compensation Act by Roy Cuccia, employee, opposed by Benjamin Melone, employer. On petition for writ of review to review an award of the Industrial Accident Commission of the State of California awarding compensation to the employee.

Award affirmed.

Caesar A. Roberts, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

SHINN, Justice pro tem.

Upon findings that respondent Roy Cuccia, 16 years of age, suffered injuries in the course of and arising out of his employment by the petitioner herein, an award was made to him by the Industrial Accident Commission, based upon the minimum average earnings provided by law as a basis for compensation, and also for certain expenses and attorney's fees. The only point urged on this proceeding to review the award of respondent commission is that the applicant Cuccia was not an employee of petitioner under the Workmen's Compensation, Insurance and Safety Act of 1917, as amended (Deering Gen. Laws 1931, Act 4749, p. 2272 et seq., Deering's Supp. 1933, p. 1831 et seq.).

[1] Petitioner was a peddler of fruits and vegetables, in which business he drove a truck and sold from house to house. He was assisted, at times and as often as he had need for their services, by a number of small boys, among them the applicant Cuccia, who took fruits or vegetables from the truck in buckets and sold same to householders. In the morning of the day the applicant was injured, six boys, including Cuccia, assisted petitioner in selling cantaloupes. At noon they had lunch at petitioner's residence, and in the afternoon, at petitioner's request, as they were accustomed to do when some of the produce remained unsold, they took the truck and endeavored to sell the remainder of the cantaloupes. One of the boys drove the truck and directed the work of the other boys. Each boy was paid 20 per cent. of the amount of his sales, and the boy in charge of the truck was paid 10 per cent. of the amount of the total sales. The business had been carried on in this fashion by petitioner for several months, and Cuccia had been so employed for a week. He had worked with petitioner on the morning of July 3, 1934, for which he had been paid, and had been directed by petitioner to go with the other boys in the afternoon to sell melons. Cuccia rode and worked with the other boys on the truck. As they were returing to petitioner's home with the unsold melons, the truck was struck by an automobile and Cuccia was injured. He was therefore engaged in his employment at the time of his injury. Harlan v. Ind. Acc. Comm., 194 Cal. 352, 228 P. 654.

[2] We think petitioner's contention that respondent was an independent contractor is not well founded. The produce belonged to petitioner, he fixed the prices at which it should be sold, the unsold portion was returned to him, with the proceeds of sales, and the boys were paid their commissions either by the petitioner or on his behalf. The boys reported for work to petitioner, were directly under his supervision while he was driving the truck, and at all times were subject to his orders and directions or those of the boy who was in charge of the truck when petitioner did not go along. While no term of employment had been agreed upon, the boys were working in the regular business of petitioner in the customary way, and were subject to discharge at any time. There were present the essentials of the relationship of employer and employee, as defined by sections 7 and 8 of the act, as amended (Deering's Gen. Laws 1931, Act 4749, pp. 2272, 2277, Deering's 1933 Supp. p. 1831). Call Pub. Co. v. Ind. Acc. Comm., 89 Cal. App. 194, 264 P. 300; Globe Ind. Co. v. Ind. Acc. Comm., 208 Cal. 715, 284 P. 661; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721; Claremont Country Club v. Ind. Acc. Comm., 174 Cal. 395, 163 P. 209, L. R. A. 1918F, 177; Brown v. Ind. Acc. Comm., 174 Cal. 457, 163 P. 664.

The boys were not working in pursuit of an independent calling; they were not free to go about their tasks in their own uncontrolled way with a responsibility only to accomplish a certain agreed result; they worked when they were given work to do and sold petitioner's goods to whomsoever they found willing to buy. Even though they were free to travel the streets of the district served by petitioner, which the boy in charge of the truck thought would be likely to produce the most trade, they were, nevertheless, subject to control and to discharge, and manifestly were not "independent contractors," as that term is defined in the act (section 8[b], as amended [Deering's Gen. Laws Supp. 1933, Act 4749, p. 1831]), and as it is construed in Flickenger v. Ind. Acc. Comm., 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150; Freiden v. Ind. Acc. Comm., 190 Cal. 48, 210 P. 420; and Fidelity, etc., Co. v. Ind. Acc. Comm., 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304.

[3, 4] The relation was purely one of employer and employee. The employment was of indefinite duration, no time for the termination thereof being fixed. It did not appear that the work of respondent was to be completed within ten days or that his total remuneration would be less than $100. The employment, therefore, was not "casual," as that term is defined by the act. Section 8(c), as amended (Deering Gen. Laws Supp. 1933, Act 4749, p. 1831). The fact that the compensation was paid by way of commissions, instead of salary, is not material. Brown v. Ind. Acc. Comm., supra.

The award was properly made and is, therefore, affirmed.

We concur: HOUSER, P. J.; YORK, J.

9 Cal.App.2d 542

THOMPSON v. CITY OF LA MESA et al.

Civ. 1924.

District Court of Appeal, Fourth District, California.

Oct. 17, 1935.

As Modified on Denial of Rehearing Nov. 15, 1935.

Municipal corporations 🔑964

Where there was no money available to be transferred to bond redemption fund, city of sixth class had mandatory duty to levy tax not exceeding 10 cents on each $100 of assessed valuation with which to pay overdue principal and interest on bonds issued under Improvement Act of 1911 and Improvement Bond Act of 1915 (St. 1911, p. 730, as amended; St. 1915, p. 1441, as amended).

Petition for writ of mandate by D. E. Thompson against the City of La Mesa, a municipal corporation, and others.

Peremptory writ issued.

Harvey H. Atherton, of San Diego, for petitioner.

W. H. Jennings, of La Mesa, and Mitchell & Johnson, of Los Angeles, for respondents.

MARKS, Justice.

Petitioner has applied for a writ of mandate to compel respondents to pay available funds in its treasury into a bond redemption fund, with which to pay delinquent interest and principal on street improvement bonds, or to levy a tax to raise sufficient money with which to pay delinquencies. An alternative writ of mandate was issued commanding respondents to pay $11,302.40 into such bond redemption fund, or, failing to have such funds available in the city treasury, to levy a tax to pay the delinquent principal and interest on the bonds. Respondents demurred to the petition and filed an answer.

The city of La Mesa is a city of the sixth class organized under the Municipal Corporation Act (St. 1883, p. 93, as amended). The individual respondents are officers of the city.

In May, 1928, the city instituted proceedings under the Improvement Act of 1911 (St. 1911, p. 730, as amended) for the improvement of several of its streets. This resulted in the issuance of bonds to pay for the work under the Improvement Bond Act of 1915 (St. 1915, p. 1441, as amended). Petitioner became the owner of a number of these bonds, on all of which the interest is in default and on some of which the principal. No question has been raised as to either the regularity of the street improvement proceedings or the issuance, sale, and delivery of the bonds. It is stipulated that there is no available money in the city treasury to be transferred to the bond redemption fund.

The issues in this proceeding have been definitely settled by the cases of American Co. v. City of Lakeport, 220 Cal. 548, 32 P.(2d) 622; Union Safe Deposit Bank v. City of Menlo Park (Cal. Sup.) 43 P.(2d) 811; Southern California Roads Co. v. County of San Luis Obispo (Cal. Sup.) 48 P.(2d) 34; Griffith Co. v. County of Los Angeles (Cal. Sup.) 48 P.(2d) 35; and Sawyer v. County of San Luis Obispo (Cal. Sup.) 48 P.(2d) 35.

Various parcels of private property have been sold in the city of La Mesa for tax delinquencies which included levies for the principal and interest due on the improvement bonds. The petition alleges the total amount of the levies to pay the principal and interest on the improvement bonds for which property has been sold to the city of La Mesa at the sum of $25,184.69, or more than $13,882.29 more than is alleged to be delinquent on improvement bonds owned by petitioner.

In the case of the Union Safe Deposit Bank v. City of Menlo Park, 43 P.(2d) 811, 812, the Supreme Court said: "We are, therefore, of the opinion that a mandatory duty rests upon the respondents to levy and collect a tax to meet said delinquent assessments, such tax, however, being limited to 10 cents on each $100 of assessable property as provided in section 16a of said act (as amended in 1921, Stats. 1921, pp. 224, 230), and that said levy be made and said tax levied on or before the time fixed by law for the next general tax levy for municipal and county purposes."

It follows that petitioner is entitled to have a peremptory writ of mandate issued requiring respondents to levy and collect a tax to meet the delinquent assessments, the tax to be in an amount and levied and collected at the time and in the manner specified in the foregoing quotation from the case of Union Safe Deposit Bank v. City of Menlo Park, supra, the amount to be collected not to exceed the total principal and interest due and unpaid on petitioner's bonds on June 13, 1935, the date of the filing of the petition herein.

The demurrer is overruled, and it is ordered that a peremptory writ of mandate issue in accordance with the views herein expressed.

We concur: BARNARD, P. J.; JENNINGS, J.

In re McCONNELL'S ESTATE. *

McCONNELL v. BIBLE INSTITUTE OF LOS ANGELES et al.

Civ. 10381.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1935.

Rehearing Denied Nov. 11, 1935.

Hearing Granted by Supreme Court Dec. 9, 1935.

1. Bills and notes 🔑316

Assignee of note giving no consideration therefor stands in shoes of assignor.

2. Gifts 🔑42, 77

Gift of note, either inter vivos or causa mortis, cannot create obligation in favor of donee against estate of donor.

* For subsequent opinion see 58 P.2d 639.

3. Partnership 🔑83

One partner is entitled to no more compensation than another, in absence of agreement to contrary.

4. Wills 🔑59

Execution of prior wills providing for legacy does not create vested right, in absence of agreement to provide for legacy, supported by valuable consideration.

5. Bills and notes 🔑493(1), 518(1)

Consideration for written note is presumed, but want of consideration may be shown by extrinsic evidence (Code Civ. Proc. § 1963, subd. 21).

6. Bills and notes 🔑493(1)

Presumption of consideration for written note is evidence, and will support finding made in accordance therewith, even though there may be evidence to contrary (Code Civ. Proc. §§ 1957, 1963, subd. 21).

7. Bills and notes 🔑493(4)

Person affirmatively showing lack of consideration for written note cannot claim benefit of presumption of consideration as against own admission under oath (Code Civ. Proc. § 1963, subd. 21).

8. Contracts 🔑76

Statute providing that moral obligation originating in some benefit conferred upon promisor or prejudice suffered by promisee may be good consideration for promise means that a moral obligation is sufficient to support express promise only where good and valuable consideration has once existed (Civ. Code, § 1606).

9. Limitation of actions 🔑15

That instrument was executed which would have amounted to waiver of statute of limitations or renewed promise, if legal debt had existed, cannot create debt which was nonexistent in fact.

10. Bills and notes 🔑92(7)

Services rendered by member of partnership without agreement for additional compensation from copartner and advice to former partner after dissolution of firm for which no payment could have been enforced, and fact that note was executed in lieu of bequests to payee in maker's will, *held* insufficient consideration for note reciting services and advice to maker over period of 15 years as consideration for its execution.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings in the matter of the estate of Lee A. McConnell, deceased, on the petition of the Security-First National Bank of Los Angeles for approval of its account as special administrator of the estate of Lee A. McConnell, deceased. From the portion of an order approving the account, which allowed the claim of the Bible Institute of Los Angeles, and overruled objections thereto, Frankie E. McConnell, contestant, appeals.

Reversed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens and William Larrabee, both of Los Angeles, of counsel), for appellant.

Newby & Newby, of Los Angeles, for respondent.

ROTH, Justice pro tem.

This is an appeal from that portion of an order approving an account in the above estate, which allows the claim of the Bible Institute of Los Angeles in the sum of $5,000, and overrules the objections of Frankie E. McConnell, appellant and contestant, wife of the deceased, to such claim.

The claim is predicated on a promissory note in words and figures as follows:

"Los Angeles, California, Dec. 6th, 1927,

"For value *receved* I here *by* instruct the administrator or executor of my estate to pay to J. M. Irvine or order the sum of Five thousand Dollars within six months from date of my death.

"[Signed] Lee A. McConnell,
1701 North Ogden Drive
Hollywood, Calif.

"The above note is payment of service and advice rendered for a period of 15 years. Dec. 6th, 1927.

"Lee A. McConnell

"Without recourse, I hereby assign and transfer the within note to the Bible Institute of Los Angeles, (a Religious corporation).

"Dated January 9th, 1928.

"[Signed] J. M. Irvine."

[1] The sole question presented on this appeal is whether J. M. Irvine, the payee named in the note and assignor of the claim herein, gave valuable consideration for the note, or whether the deceased, the maker of the note, attempted to make a gift thereof. It is admitted that the Bible Institute gave no consideration for the note. It therefore stands in the shoes of the payee and assignor.

[2] It is settled that the gift of a promissory note, either inter vivos or causa mortis, cannot create an obligation in favor of the donee against the estate of the donor. Coon v. Shry, 209 Cal. 612, 289 P. 815; Tracy v. Alvord, 118 Cal. 654, 50 P.

757; Wisler v. Tomb, 169 Cal. 382, 146 P. 876; Hironymous v. Hiatt, 52 Cal. App. 727, 199 P. 850.

The evidence shows without dispute that Irvine and deceased had been in partnership approximately 12 years beginning in 1906 and ending in 1918, on which latter date the partnership was terminated, and the assets thereof equally divided. During the existence of the partnership, because of illnesses of and certain trips made by deceased, Irvine put in more time on partnership affairs than did the deceased. This fact was not taken into account at the time the partnership affairs were settled in 1918, nor did the articles of copartnership provide for extra compensation to either of the partners for extra or unusual services rendered to the partnership. After the dissolution of the partnership, both men continued what appeared to be a cordial social relationship. It appears that Irvine on at least two occasions advised deceased with reference to things that deceased was doing or had in contemplation for the Bible Institute. The evidence on this phase of the matter is vague and unsatisfactory. There is, however, no evidence that Irvine expected to be paid, or that the deceased expected to pay, for such advice. Further, the circumstances under which the note was given, as hereinafter detailed, do not remotely suggest that the note was given in consideration for such advice. The note in question appears to have been executed on the date it bears, December 6, 1927, which was approximately nine years after the actual and legal termination of the partnership which had existed between the two men. At that time the following conversation took place, according to the uncontradicted testimony of Irvine:

> "He said to me that he had made a new will and that in place of specifying the amount of five thousand dollars to be paid to me out of his estate, that he had given me this estate note in its place; that he felt it would be a more satisfying thing to have, that there would be less possibility of its being contested; and he said also that he was placing this endorsement on the note so that there would be no question as to its validity. * * * He said that he recognized the fact that he was under obligations to me, and for that reason he had in *one or more wills preceding this date,* remembered me in his will for the amount of five thousand dollars, but that he was changing the will now and placing it in this form." (Italics ours.)

Irvine further testified showing the nature of the services rendered as follows:

> "I don't recall that there was anything very definitely stated on that line, Mr. Newby. He recognized the fact that during his European trip I had been under a very severe strain, due to the sudden death of my mother, and sudden collapse of my sister, and the responsibility for her care on my shoulders, and the entire business affairs; and it happened to be an active period in the business; and one remark—when he returned, was that he felt he had better remain away, because the business prospered more during his absence than when he was present. I recollect that distinctly.
>
> "Q. And in which he informed you that he felt that he was indebted to you for the extra services you had rendered? A. He so stated. * * * The entire business of the copartnership was in my hands during the latter years of the partnership, except that Mr. McConnell would take some interest in negotiating a real estate loan, or if a sale of property was in progress, he would take some interest in that; but so far as the management of the properties under our control was concerned, and the matter of insurance and the question of rents, and all of those details of the office, he had nothing whatever to do with it, and refused to discuss them with anyone in the office, referring them in every case to me."

[3, 4] All of the services above referred to were rendered during the existence of the partnership, and it was undisputed that the partnership agreement which existed between the two men required each to render equal services. It is also undisputed that in previous wills, which had been executed prior to the execution of the note in question by deceased, the deceased had provided a legacy of $5,000 for Irvine. While it is true that there is vague testimony which shows that Irvine gave advice to the deceased after the dissolution of the copartnership on two occasions concerning matters the deceased had in contemplation for Bible Institute, there is no showing of any circumstances which would have enabled Irvine to state a cause of action for the reasonable value of said advice, if he had been so inclined, and the foregoing excerpts from Irvine's testimony demonstrate that the "service and advice rendered for a period of 15 years" recited in the note refers to service and advice rendered during the existence of the partner-

ship between the two men. This conclusion is strengthened further by the admitted fact that the deceased, prior to delivery of the note here in question, had remembered Irvine "in one or more wills preceding * * * date" of the note. It is settled that one partner is entitled to no more compensation than another, in the absence of an agreement to the contrary. Cook v. Bryson, 89 Cal. App. 445, 265 P. 289; Nevills v. Moore Min. Co., 135 Cal. 561, 67 P. 1054; Wright v. Robinson, 51 Cal. App. 461, 197 P. 149. In view of the fact that the partnership affairs were settled in 1918 and no provision made for the extra services rendered by Irvine, and the further fact that the agreement of partnership called for no extra or special compensation for extra or special services rendered by the partners, it cannot be said that the execution of the note in 1927 was in payment of a legal claim. Osment v. McElrath, 68 Cal. 466, 9 P. 731, 58 Am. Rep. 17. The execution of the prior wills providing for a legacy does not, in the absence of an agreement so to do, supported by valuable consideration, create any vested right. Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am. St. Rep. 43; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242; In re Estate of Berger, 198 Cal. 103, 243 P. 862; Cohn v. Klein, 209 Cal. 421, 287 P. 459.

[5-7] While consideration is presumed because the instrument is in writing (Code Civ. Proc. § 1963, subd. 21), want of consideration may be shown by extrinsic evidence. Royer v. Kelly, 174 Cal. 70, 161 P. 1148; Braselton v. Vokal, 53 Cal. App. 582, 200 P. 670; Andrews v. De Lorm, 102 Cal. App. 623, 283 P. 393; Johnston v. Courtial, 216 Cal. 506, 14 P.(2d) 771. It is also true that the presumption of consideration is evidence (Code Civ. Proc. § 1957), and will support a finding made in accordance therewith, even though there may be evidence to the contrary. McAlvay v. Consumers' Salt Co., 112 Cal. App. 383, 297 P. 135; In re Estate of Wiechers, 199 Cal. 523, 250 P. 397; People v. Siemsen, 153 Cal. 387, 95 P. 863; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919; Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913. When, however, the evidence given by the person, in whose favor the presumption runs, shows affirmatively that there was no valuable consideration, such person cannot claim the benefit of the presumption as against his own admission under oath. Braselton v. Vokal, 53 Cal. App. 582, 200 P. 670; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922; Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269.

[8] Respondent contends that even though there is no valuable consideration for the note in question, there is such a moral consideration or obligation as will support a contract within the meaning of section 1606 of the Civil Code. Said section is as follows: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

It is true that in some states a moral, as distinguished from a legal, consideration, will under some circumstances be sufficient to form a valid and binding contract (Rask v. Norman, 141 Minn. 198, 169 N. W. 704, 17 A. L. R. 1299), but such has never been the rule in this state. California cases have construed said Code section to mean that "a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once existed." 6 Cal. Jur. 181, § 124; Sullivan v. Sullivan, 99 Cal. 187, 33 P. 862; Peek v. Peek, 77 Cal. 106, 19 P. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Bickerdike v. State, 144 Cal. 681, 78 P. 270; Pacific Rys. Advertising Co. v. Carr, 29 Cal. App. 722, 157 P. 529; Royer v. Kelly, 174 Cal. 70, 161 P. 1148; 13 Cor. Jur. 360.

[9, 10] The uncontradicted evidence in this case demonstrates that Irvine, conceding that he performed more services than did the deceased for the partnership which existed between himself and deceased, never had a legal claim for extra compensation for such services against the partnership or against the deceased. If Irvine had had such a legal claim and the statute of limitations had run against the same, then a subsequent written promise in the form of a promissory note, or in any form, by deceased to pay $5,000, would be binding, whether it arose "upon the fact that the debtor has received and the creditor parted with the consideration for the debt, that it has never been in fact paid, and that in foro conscientiae it ought to be paid, notwithstanding the bar" (6 Cal. Jur. 182); or be-

cause a debt once incurred is always a debt until paid or discharged. The law may and does permit a debtor to prevent collection of a debt by a plea of the statute of limitations or by bankruptcy, but there is no requirement of the law that a debtor shall insist upon such benefits; and there is no doubt that they may be waived. There is no evidence in this case which shows that the assignor of respondent Bible Institute ever had a legal claim. It follows that there was no occasion for the alleged debtor to waive anything. The fact that an instrument was executed which would have amounted to a waiver or a renewed promise if a legal debt had existed cannot create a debt, when none in fact existed.

That portion of the order approving the account which approves the allowance of the claim of Bible Institute of Los Angeles in the sum of $5,000 is reversed.

We concur: HOUSER, P. J.; YORK, J.

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8 Cal.App.2d Supp. 763

PEOPLE v. LEVY et al.

Cr. A. 1172.

Appellate Department, Superior Court, Los Angeles County, California.

May 28, 1935.

1. Criminal law 🔑578

Granting or refusing of continuance is judicial act and cannot be controlled by counsel even by stipulation.

2. Criminal law 🔑1166(8)

Where deputy city attorney allegedly informed defendant's counsel that amended complaint would be filed when case was called for trial to correct typographical error and that defendant would receive continuance, but where typographical error had been corrected in original complaint when case was called for trial, trial court's refusal to grant continuance *held* not prejudicial error, in absence of showing that defendant was deprived of evidence that he could have produced at later date.

3. Municipal corporations 🔑589

Subject only to the control of general laws, entire police power of state may be exercised by city council of Los Angeles within limits of its jurisdiction.

4. Municipal corporations 🔑611

Business may be inherently lawful and still be subject to police regulation by municipality.

5. Municipal corporations 🔑622

Fact that ordinance prohibiting the solicitation of tort claims for settlement was confined to tort claims *held* not to render ordinance invalid.

6. Municipal corporations 🔑622

Ordinance prohibiting the solicitation of tort claims for settlement *held* valid exercise of police power where uniform and general in its application.

7. Municipal corporations 🔑640

Evidence *held* to sustain conviction of violating ordinance prohibiting solicitation of tort claims for settlement.

8. Criminal law 🔑423(1)

Where conspiracy exists, acts and declarations of each coconspirator, done and made in furtherance of illegal project, prior to accomplishment thereof, may be considered as evidence against all of parties to conspiracy.

9. Champerty and maintenance 🔑10

Recommendation or willingness to recommend an attorney, on inquiry by a third party, does not constitute "solicitation" denounced by statute, the idea for which, as between defendant, charged with having made solicitation, and the person solicited, must have its origin in mind of defendant, who must also perform some overt act calculated to bring about the employment so solicited (St. 1931, p. 2198, § 3).

[Ed. Note.—For other definitions of "Solicitation," see Words & Phrases.]

10. Criminal law 🔑1159(1)

Appellate court cannot substitute itself for and usurp function of jury on ultimate question of fact.

11. Champerty and maintenance 🔑10

Evidence *held* sufficient to sustain conviction for soliciting business for attorney on one count, but insufficient to sustain conviction on another count (St. 1931, p. 2198, § 3).

Appeal from Municipal Court of City of Los Angeles, Los Angeles County; Arthur Crum, Judge.

Joseph Levy was convicted of violating an ordinance of the City of Los Angeles prohibiting the solicitation of tort claims for settlement, and A. Gottlieb was convicted of violating statute prohibiting solicitation of business for attorneys, and they appeal.

Judgment as to defendant Levy affirmed. Conviction of defendant Gottlieb affirmed on one count and reversed on other count, and cause remanded for a new trial.

Frank G. Tyrrell, of Los Angeles, for appellant Levy.

Harry C. Cogen, Oscar Richard Cummins, and Max L. Raskoff, all of Los Angeles, for appellant Gottlieb.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for the People.

B. REY SCHAUER, Judge pro tem.

Defendant Joseph Levy appeals from judgments of conviction pronounced after verdicts were returned finding him guilty on two counts of violation of section 2, Ordinance No. 73706 of the City of Los Angeles; and defendant A. Gottlieb appeals from judgments rendered upon verdicts of guilty on two counts of violation of section 3, c. 1043, Statutes of 1931 (page 2198). These defendants, with a codefendant, were originally charged jointly with conspiracy to violate the ordinance and statute above mentioned and with various alleged specific violations of each. The count pleading conspiracy was properly dismissed as beyond the jurisdiction of the municipal court and all the other counts have been disposed of favorably to all the defendants, except counts V and IX as to defendant Levy, and counts II and VIII as to defendant Gottlieb, which resulted in the convictions and sentences above mentioned.

Both appealing defendants assert that the court erred and abused its discretion to their prejudice in denying a continuance under the circumstances shown; the defendant Levy assails the ordinance, for violation of which he was convicted, upon constitutional grounds; and both defendants assert that the evidence was insufficient to support the several verdicts of guilty.

On November 28, 1934, trial being then calendared for December 3, 1934, defendant Gottlieb's counsel was informed by the chief trial deputy city attorney that to correct a typographical error in the complaint on file an amended complaint would be filed when the case was called for trial on December 3 "and that affiant would receive a continuance as a matter of course in which to plead and for a trial setting." Some time thereafter, but prior to December 3, the substance of the foregoing statement was communicated to counsel for defendant Levy. When the cause was called for trial at 9:30 a. m. on December 3, it was discovered that the "typographical error" had already been corrected in the original complaint and existed "only in the copy of the city attorney's office." Appellants then secured a continuance until 2 p. m. of that day, at which time they presented affidavits reciting the above-narrated facts, asserting reliance thereon, lack of preparation for trial, and a belief that the defendants' rights would "be prejudiced if not sacrificed" by proceeding to trial at that time. The court denied further continuance.

[1,2] No showing was made of any authority in the office of the city attorney to justify the statement by a deputy or reliance thereon by counsel "that affiant would receive a continuance as a matter of course in which to plead and for a trial setting." The record fails to show that the "typographical error" which existed "only in the copy of the city attorney's office" was of such a substantial character that amendment thereof, even if it had existed in the original complaint, would have required a continuance; the granting or refusing of a continuance is a judicial act and cannot be controlled by counsel even by stipulation. Lorraine v. McComb, 220 Cal. 753, 32 P.(2d) 960. Even if there were error or an abuse of discretion (neither of which appears) in the ruling complained of, the record does not show that either appellant was thereby deprived of any evidence that he could have produced at a later date, or that he was otherwise prejudiced.

Appellant Levy, in his attack on the constitutionality of Ordinance No. 73706, contends that it is an invasion of the legislative prerogative of the state, rather than a municipal regulation; that it is an unlawful prohibition of a lawful business; that it is not uniform in operation, impairs the freedom of contract, and conflicts with the state law licensing the business of private detectives and investigators.

Section 2 of Ordinance No. 73706, reads as follows: "It shall be unlawful for any person to solicit employment for himself or for any other person, either directly or through some other person acting on his behalf to prosecute, collect, settle, compromise or to negotiate for the settlement, compromise or collection of any tort claim, on behalf of any tort claimant, in which he himself has no pecuniary interest arising from such tort."

[3-6] The mere fact that the business of adjusting and settling tort claims affects the public welfare generally throughout the state does not mean that the police power to regulate such business, and particularly to *prohibit the solicitation thereof*

within a given municipality, must be exercised exclusively by the State Legislature. On the contrary, subject only to the control of general laws—and the ordinance under consideration is obnoxious to none that has been called to our attention—the entire police power of the state may be exercised by the city council of Los Angeles within the limits of its jurisdiction. In re Maas, 219 Cal. 422, 424, 425, 27 P.(2d) 373. A statute similar in effect in the state where it is law, to the effect in the city of Los Angeles of the ordinance here involved, has been upheld; the court pointing out that *prohibition of solicitation* of tort claims for settlement is but a *regulatory* measure affecting the business of *adjusting and settling* such claims and does not prohibit the business of collecting claims or making unsolicited contracts with injured persons. Kelley v. Boyne, Judge of Recorder's Court, 239 Mich. 204, 214 N. W. 316, 53 A. L. R. 273. The constitutionality of this statute was again upheld in Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N. W. 97, 86 A. L. R. 509. Such laws are not violative of the United States Constitution. McCloskey v. Tobin, 252 U. S. 107, 40 S. Ct. 306, 64 L. Ed. 481. A business may be inherently lawful and still subject to police regulation. Lewis v. Quinn, 217 Cal. 410, 413, 19 P.(2d) 236. The fact that operation of the ordinance is confined to solicitors of tort claims and that there may be other businesses in which similar regulation might conduce to the public welfare does not render the instant ordinance invalid. In re West, 75 Cal. App. 591, 596–598, 243 P. 55. It is uniform and general in its application to all persons engaging in the business of collecting, adjusting or otherwise handling tort claims. No one may solicit such claims in the city of Los Angeles, not even licensed private detectives or investigators, and the ordinance does not conflict with general state laws because such licensed investigators, in equality with every one else, must refrain from the forbidden acts. They are not in any wise by such ordinance restrained from investigating tort cases in which they may be employed, but the proper scope of authorization under their license does not include the solicitation of employment "to prosecute, collect, settle, compromise or to negotiate for the settlement, compromise or collection of any tort claim." We are of the opinion that Ordinance No. 73706, under the present status of our general laws, is a proper and valid exercise of police power by the municipality.

[7] As to defendant Levy the evidence is ample to support the jury's verdicts on both counts V and IX, being sufficient to show that he solicited employment, not merely to investigate, but to "handle" the case and "get a good sum for damages" (Count V, Rep. Tr. p. 91, Ll. 14–20) and "to take care of the case * * * and get me some money out of it" (Count IX, Rep. Tr. p. 124, Ll. 25–27). The recitals in the written agreements did no more than create a conflict in evidence and were not binding upon the state. People v. Harris, 128 Cal. App. 44, 49, 16 P.(2d) 688.

[8-11] The defendant Gottlieb, convicted as charged in counts II and VIII of violation of section 3, c. 1043, Stats. of 1931 (page 2198), contends that the evidence is not in either case sufficient to show any violation of the statute which declares it unlawful "to act as a runner or capper or to solicit any business for attorneys." The evidence in support of neither of the counts mentioned is sufficient to show that the defendant acted as a "runner or capper" as those terms are defined in section 5 of the act. As to count II, excluding from consideration the testimony relating to the conversation between the witness Evans and the defendant Levy, as we must do under the ruling of the trial court relative thereto, we think the conviction cannot be sustained upon any theory. Upon a new trial, if one is had, the court with appropriate instructions may submit to the jury the question as to whether or not a conspiracy to commit the unlawful acts did in fact exist, and if it is found that such conspiracy did exist then the acts and declarations of each of the coconspirators, done and made in furtherance of the illegal project, prior to the accomplishment of its object, may be considered as evidence against all of the parties to the nefarious compact. People v. Keller, 124 Cal. App. 673, 676, 12 P.(2d) 1066.

As heretofore mentioned, the statute not alone prohibits acting as a "runner or capper," as those terms are defined therein, but it also declares it to be unlawful "to solicit any business for attorneys." The evidence in support of the allegations of count II, upon the present state of the record, merely shows a *recommendation,* or willingness to recommend an attorney, upon inquiry by a third party. This falls short of the solicitation denounced by the statute the idea for which, as between defendant and the person solicited, must have its origin in the mind of the defendant, who must also perform some overt act calculated to bring about the employment so solicited. The evidence of the transaction forming the res gestæ of count VIII is somewhat conflicting, but legally is sufficient (Rep. Tr. p. 151, Ll. 8 to 16) to support the implied finding of the jury, and this court cannot substitute itself for and usurp the function of the jury on the ultimate question of fact. Southern California Music Co. v. Labes, 106 Cal. App. 255, 288 P. 1096.

In the appeal of the defendant Joseph Levy, the judgments upon both counts are affirmed; in the appeal of the defendant A. Gottlieb, the judgment upon count VIII is affirmed, while that upon count II is reversed, and the cause as to said count II is remanded to the municipal court of the city of Los Angeles for a new trial.

We concur: SHAW, P. J.; FOX, J.

On Petition for Rehearing.

Complaint is made in the petition for rehearing on behalf of defendant Gottlieb that this court did not in its opinion "distinguish running and capping from mere solicitation." The court did enumerate the essential elements of "solicitation," which term is not defined in the statute, and did not assume to define the words "running" and "capping" for the reason that the precise significance attaching to their use in such statute is declared in section 5 thereof. A reading of that section discloses that the element of agency (and the word "agent" is defined therein) is necessary to constitute "running" or "capping" but is not essential to establish the alternative violation of section 3 by solicitation.

4 Cal.2d 528

MYERS v. STATE BAR OF CALIFORNIA.

L. A. 15296.

Supreme Court of California.
Oct. 29, 1935.

1. Attorney and client ⚷44(1)

Attorney who was retained to secure release of Mexican client who had been convicted of violating State Narcotic Act, and in open court and in presence of interpreter had been given alternative of three-year jail sentence or three-year probation in Mexico, *held* not subject to discipline for alleged failure to disclose true terms of probation offer to client.

2. Attorney and client ⚷44(1)

Attorney's charging client of limited means $150 for effort to procure modification of terms of probation offer allowing client, convicted of violation of State Narcotic Act, alternative of three-year jail sentence or probation in Mexico which was made by court to client before retention of attorney, and for procuring release of client under order originally made, *held* not to warrant discipline.

CONREY and SHENK, JJ., dissenting.

In Bank.

Petition by John H. Myers, attorney at law, to review an order of the State Bar of California, recommending suspension of petitioner.

Proceeding against petitioner dismissed.

D. G. Donahue, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

WASTE, Chief Justice.

It is recommended to this court by the respondent State Bar that petitioner, an attorney at law, be suspended from the practice for a period of three months because of the alleged violation of his oath and duties as an attorney. Specifically, it is found that petitioner withheld certain facts material to his employment by and services for a client and that he attempted to collect an unconscionable fee for such services. This proceeding was instituted by petitioner to review the action so taken against him.

It appears that in November, 1933, one Eugenio Vasquez entered a plea of guilty to a charge of violating the State Narcotic Act. Under the judgment of the court, Vasquez was given the alternative of serving three years in the county jail or serving said three years on probation in the republic of Mexico, of which country he was a native. The sentence, including the terms of probation, was announced in open court in the presence of Vasquez, his then counsel (a deputy public defender of Los Angeles county), and an interpreter. After Vasquez had served approximately six months of the sentence in the county jail, his wife called at petitioner's office to enlist his aid in procuring the release of her husband. Petitioner thereupon visited Vasquez in the county jail with a view to going over the matter with him. Following two or three interviews with Vasquez and a checking of the criminal record, petitioner moved the trial court for a modification of the probation terms so as to permit Vasquez to serve the probationary period in Los Angeles county or at a road camp. Upon the denial of such motion, petitioner, in accordance with the provisions of the court's order entered against Vasquez, procured the latter's release upon his promise to return to Mexico. Petitioner thereupon advanced Vasquez approximately $6 to defray his transportation costs, and personally saw to it that he departed in compliance with the terms of his probation.

[1] The case against petitioner is founded, principally, upon the testimony of Vasquez, taken by deposition, to the effect that in his early interviews with petitioner the latter did not inform him that, in order to procure his release from the county jail, it was merely necessary that he agree to go to Mexico, but that, instead, petitioner, without mentioning this fact, undertook to procure his release for an agreed fee of $50.

Petitioner, on the other hand, testified that, when the wife of Vasquez came to see him about the release of her husband, she stated that they were without money, but would deed certain real property of little value to him as security for his fee, which he told her he could not then fix definitely until he looked into the matter; that he then spent several days interviewing Vasquez, on one of which days he informed Vasquez that he would undertake to procure his release for a fee of $150; that this amount was agreed on between them and the deed above re-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ferred to executed as security therefor; that in the course of handling the matter he examined the pertinent records, and, having made an unsuccessful attempt to have the trial judge modify the terms of the probation offer so as to permit of its service in this state or at a road camp, procured the release of Vasquez under the order as originally made; that he advanced Vasquez the necessary transportation costs of $6; and that to date he had received only $10 in payment of his fee—an obvious cash profit to him of $4.

It is immediately apparent that the testimony, as is usual, is conflicting in many essential details. Without attempting to weigh the evidence, a prerogative reserved to us in proceedings of this character, we do not hesitate to say that it is difficult to accept the finding that petitioner "failed to disclose the true terms of the probation to Vasquez, and, thereby misled him," when it is considered, as already stated, that the terms of probation were stated in open court upon the pronouncement of judgment against him in his presence and in the presence of his then counsel and an interpreter. If, in fact, petitioner, upon his employment, did not repeat the terms thereof to Vasquez, it might well and reasonably have been assumed to be unnecessary under the circumstances.

[2] However, and aside from this, we are not satisfied that a contract for a fee of $150 for the services performed, including the unsuccessful effort to procure a modification of the terms of probation, is so unconscionable, under all of the circumstances, as to warrant disciplinary action against petitioner. The rule announced in Goldstone v. State Bar, 214 Cal. 490, 6 P.(2d) 513, 80 A. L. R. 701, is not applicable here.

The proceeding against petitioner is dismissed.

We concur: LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

CONREY, Justice.

I dissent.

The case against petitioner is one wherein it appears that in his relation of attorney at law he exacted (and took security for) a promise to pay a fee of $150, which was an exorbitant fee to charge against "a client admittedly of limited means for a most trivial service." Goldstone v. State Bar, 214 Cal. 490, 498, 6 P.(2d) 513, 516, 80 A. L. R. 701. If we eliminate from petitioner's description of the work done by him, that part which was shiftless and unnecessary ("made work"), the remainder is very small indeed. Moreover, the evidence justifies the conclusion that petitioner knowingly misled his client by failure to disclose facts which the client was entitled to know.

Petitioner has not sustained the burden of showing that the bar committee's findings are against the clear weight of the evidence. For that reason I hesitate to agree to an order which in effect reverses the decision of the Board of Governors of the State Bar.

I concur: SHENK, J.

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4 Cal.2d 495

PEOPLE v. TAYLOR.

Cr. 3869.

Supreme Court of California.

Oct. 23, 1935.

1. Criminal law 🔑494, 741(4)

Opinion of expert testifying concerning measurements of footprints and shoes and their correspondence with each other, even if uncontradicted, is not conclusive, and it is for jury to consider opinion evidence together with its own inspection of physical evidence.

2. Burglary 🔑41(1)

Evidence *held* to support conviction of second-degree burglary.

3. Criminal law 🔑398(1)

Refusal to permit expert to express opinion as to whether defendant could or could not wear shoe *held* not error, where defendant tried shoe on before jury.

In Bank.

Appeal from Superior Court, Los Angeles County; William S. Baird and Thomas P. White, Judges.

Wayne Taylor was convicted of burglary in the second degree, with admission of prior conviction of two felonies, and he appeals.

Affirmed.

Prior opinion, 40 P.(2d) 894.

John F. Sheffield, of Los Angeles, and Wayne Taylor, in pro. per., for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CONREY, Justice.

Appeal by defendant from judgment of conviction entered upon verdict finding him guilty of burglary in the second degree, with admission of prior conviction of two felonies.

The evidence shows that during the night of March 1, 1934, the premises of an automobile dealer at 940 East Compton boulevard, Los Angeles, were burglarized. The place was entered forcibly. The safe was opened with an acetylene torch and the contents thereof were torn out and strewn about the room. There was taken from a cash drawer $12.20 and from the safe a "pink slip" evidencing title of one Padgett to a certain automobile.

A short time prior to date of the crime, appellant, a young man of twenty-five years, arrived in California from the east, practically without funds. He occupied an apartment with one Knott, located on Van Ness street, Los Angeles. Appellant's two brothers, La Verne and Aubrey Taylor, who also came from the east, and one Pope, occupied an apartment several blocks distant on North Gower street. About two weeks after the burglary the "pink slip" taken from the safe was found by the police in the apartment of appellant's brothers and Pope, in a box containing the personal effects of the brother, La Verne.

After the burglary there was found on the floor near the safe, an invoice, previously contained therein, on which invoice appeared the imprint of the rubber heel of a man's shoe. This invoice was introduced in evidence by the prosecution; also a pair of shoes which police officers testified they found in the apartment occupied by appellant and Knott. Two police officers stated that, in the presence of other officers, appellant had identified the shoes as his and, when asked if any one else wore his shoes, answered in the negative.

The prosecution also introduced in evidence a photograph of the imprint on said invoice and a photograph of the imprint made by one of the rubber heels from said pair of shoes. An expert criminologist then took the stand to testify to the result of his study and comparison of the imprint made by the heel with the imprint on the invoice. He testified that in studying the case he had enlarged the photograph of the imprint on the invoice and made other additional photographs and prints, and also created a composite picture from portions of the prints placed in juxtaposition. Without detailing the course of his reasoning, as brought out by his thorough examination, it is sufficient to say that he pointed to correspondence between the objects before him and announced his opinion that the imprint on the invoice was made by said rubber heel from the shoes found in appellant's apartments. All of this was admitted without objection. Therefore, we are concerned, not with its admissibility, but only with its effect.

[1] In those states where the subject has been considered, the trend of authority seems to be to the effect that by reason of the great practical differences between finger prints and shoe prints, in that the shoe prints are so large and the points of similarity so obvious, the comparison of shoe prints is a matter of nonexpert, rather than of expert, testimony. And where it was held that expert testimony may be given, concerning measurements of footprints and shoes, and their correspondence with each other, it has been held that the witness may not express the direct opinion that the shoe made the tracks. 11 R. C. L. p. 628. The implication is that the expert's opinion, when given, even if uncontradicted, is not conclusive of the fact, but the jury may consider the opinion evidence together with its own inspection of the physical evidence. And this is, we think, the correct rule. The court's instruction to the jury in this case (clerk's tr. p. 28) was in harmony with this rule.

[2] Other than the evidence concerning the correspondence between the imprint of the heel of one of the shoes found in appellant's apartment and the imprint found on the invoice discovered on the floor at the place of the burglary, and the evidence that the shoe was his property, there is no evidence connecting appellant with said burglary. There is no direct evidence that he was in the vicinity of the burglarized premises on the night in question. Appellant, as a witness in his own

behalf, attempted to demonstrate that he could not get the shoe on his foot and could not wear it. The record does not clearly show the result of that experiment. At any rate, the experiment was made in the presence of the jury, which apparently must have found that the shoe could be worn by appellant. We can find no ground for holding that the evidence was legally insufficient to sustain the verdict. The most that can be said in favor of appellant's contention in this respect is that the evidence is far from conclusive and that for this reason appellant is the more likely to have been prejudiced by such errors as may have been committed in the course of the trial. But we are not able to discover any errors of sufficient importance to change the result.

[3] It is contended that the court erred in sustaining objections to questions propounded to appellant's witness Butler in connection with appellant's effort to demonstrate to the jury that he could not wear the shoe found in his apartment which, according to the evidence, made the imprint on the invoice. This witness was a shoe merchant of long experience, apparently qualified to answer such questions. The shoe having been produced and examined by said witness, he was asked to put it on appellant's foot. Objection to this procedure was sustained. After some colloquy between court and counsel the witness was asked to step aside and appellant was sworn as a witness. Appellant was asked to try to put on the shoe (People's Ex. 8). The following then occurred:

"Mr. Sheffield (appellant's counsel): * * * Sit down here Mr. Taylor. Try and get it on. Can you get it on at all?

"Mr. Butler, will you please take a look at that shoe?

"Mr. Sheffield: May I recall Mr. Butler now?

"The Court: What for?

"Mr. Sheffield: To have him pass an opinion on this.

"The Court: No, we don't want his opinion. The witness is there trying the shoe on, and that ought to be enough.

"Q. By Mr. Sheffield: Can you get it on? A. No. sir.

"Mr. Sheffield: Does the jury want to come down here and look closer? Has anybody got a shoe horn in Court?

"The Court: Oh, it is a shoe horn you want?

"Q. By Mr. Sheffield: Can you walk at all with that shoe on? A. Can't get it in."

Surely no argument is necessary to convince that the assistance of an expert was not needed to advise the jury that appellant could, or that he could not, wear that shoe.

It appears that the case was fairly tried, and that there are no sufficient grounds for reversal.

Judgment affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; SHENK, J.; CURTIS, J.

4 Cal.2d 504

PEOPLE v. KRISTY et al.

Cr. 3899.

Supreme Court of California.

Oct. 24, 1935.

Rehearing Denied Nov. 22, 1935.

1. Robbery 🔑1

Robbery is confined to no fixed locus, but is frequently spread over considerable distance and varying periods of time.

2. Kidnapping 🔑1

That convicts, having entered warden's house, robbed members of parole board and forced them to accompany convicts in automobile while effecting escape, *held* to sustain conviction of kidnapping for robbery; escape and robbery being incomplete during period that convicts were taking such members with them (Pen. Code, § 209, as amended by St. 1933, p. 2617).

3. Criminal law 🔑1122(1)

Objection that court re-read certain instructions while defendants were out of jury's sight and beyond hearing of proceedings could not be raised on appeal, where not supported by record.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Joseph Kristy and another were convicted for escaping from the state prison and for committing certain offenses incidental thereto, and they appeal.

Affirmed.

Melvin M. Belli and William Clecak, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., Albert E. Bagshaw, Dist. Atty., of San Francisco, and Harold Joseph Haley, Deputy Dist. Atty., of San Rafael, for the People.

CONREY, Justice.

Appellants Kristy and Mackay, together with one Fred Landers, were charged with offenses described in eleven counts of an indictment. Appellants, tried separately from their codefendant, were by the jury convicted on all counts. Kristy and Mackay appeal from the several judgments rendered against them and from the order denying their motion for a new trial. There was a fourth participant, one Rudolph Straight, acting with defendants in the transactions on which the charges were founded.

Defendants and Straight, on the 16th day of January, 1935, were under lawful commitment confined in the state prison at San Quentin, each for a term less than life. Count 11 of the indictment charged that the defendants, on said day, did willfully, etc., escape from the prison. The other offenses, according to the evidence, were committed in connection with the accomplishment of the escape. These incidental offenses may be designated as burglary, robbery (four counts), grand theft of an automobile, and kidnaping for robbery (counts 7, 8, 9, and 10).

[1, 2] In support of the appeal, it is first contended that the evidence is insufficient to justify the conviction of appellants under the four counts charging them with commission of the crime of "kidnaping for the purpose of robbery." A brief description of the proceedings of the defendants in effecting their escape will help to define the question presented for solution.

Four guns were secretly brought into the prison and came into possession of the defendants. Thereafter, and shortly after noon of January 16, 1935, James B. Holohan, warden, was at luncheon in his dining room at the prison. With him were Warren H. Atherton, James H. Stephens, and Frank H. Sykes, who were members of the board of prison terms and paroles, and Mark E. Noon, who was secretary of that board. At this time the three defendants and Straight, having by successful devices gained access to the warden's house, and armed with the said guns, appeared in the dining room. Within the next few minutes they robbed the three board members and the secretary by taking from them various amounts of money, jewelry, and clothing. Secretary Noon was forced to give telephone orders pursuant to which the defendants obtained a Studebaker automobile, with chauffeur, and secured directions to the guards to refrain from firing when the car was driven away. The warden ran into the adjoining room, where he was severely "beaten up" by Straight. The defendants then compelled the three board members, and Noon, and the driver of the car, to ride with them in the car, and so escaped from the prison.

In the course of the pursuit which followed, covering a distance of several miles, both Stephens and Sykes were wounded by shots fired by the pursuing officers, and Straight was killed. The defendants were captured.

Section 209 of the Penal Code (as amended by St. 1933, p. 2617) reads as follows: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

The question is presented: Did the defendants kidnap or carry away the several persons (Atherton, Stephens, Sykes, Noon) "to commit robbery"?

Primarily, the main purpose was to escape from prison. This crime they committed, with short-lived success. In order to commit the crime of escape and retain their liberty, they found it necessary to obtain a supply of ordinary civilian clothing and a supply of funds. For this purpose they attempted to rob four persons of their clothes and money. And finally, for the combined purposes of escape and robbery, they found it expedient to seize these same victims and carry them along in the path of escape.

Upon the contention of appellants that the evidence was insufficient to justify their conviction under counts 7, 8, 9, and 10, to wit, "kidnaping for the purpose of robbery," they insist that, according to the evidence, the prison officials were kidnaped as hostages solely for the express purpose of escape, subsequent to a previous robbery of these same persons; that therefore this was not a kidnaping with intent to hold or detain for the purpose of robbery. The answer to this contention is that, during the period while defendants were taking with them the persons so seized by them, the acts constituting the crime of escape were not concluded, and the robbery was still incomplete. The fact repeatedly has been recognized that robbery is not confined to any fixed locus, but is frequently spread over a considerable distance and varying periods of time. In People v. Boss, 210 Cal. 245, 250, 290 P. 881, 883, where it was shown that murder had been committed in connection with a robbery, and it was contended that the robbery had been completed before the homicide was committed, this court said:

"It is a sound principle of law which inheres in common reason that where two or more persons engage in a conspiracy to commit robbery and an officer or citizen is murdered while in immediate pursuit of one of their number who is fleeing from the scene of the crime with the fruits thereof in his possession, or in the possession of a coconspirator, the crime is not complete in the purview of the law, inasmuch as said conspirators have not won their way even momentarily to a place of temporary safety and the possession of the plunder is nothing more than a scrambling possession. In such a case the continuation of the use of arms which was necessary to aid the felon in reducing the property to possession is necessary to protect him in its possession and in making good his escape. Robbery, unlike burglary, is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time. The escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property. Without revolvers to terrify, or, if occasion requires, to kill any person who attempts to apprehend them at the time of or immediately upon gaining possession of said property, their plan would be childlike. The defense of felonious possession which is challenged immediately upon the forcible taking is a part of the plan of robbery, or, as the books express it, it is res gestæ of the crime." We are forced to the conclusion that the evidence was sufficient to justify the conviction on each of said counts 7, 8, 9, and 10.

The second principal ground of appeal as presented by counsel takes the form of a statement that the district attorney and his deputy were guilty of prejudicial misconduct which prevented a fair trial. The specifications on this point are clouded by general characterizations of the proceedings, which make it difficult to state precisely the acts to which appellants' contentions are directed. The quotations given from the address of the district attorney to the jury show that he made a zealous appeal for conviction; but the argument and appeal thus made are not shown to have been without relation to the evidence which had been produced. The claim of appellants that by virtue of such argument they were not tried only for the crimes for which they were indicted is not supported by the record.

[3] Finally, it is contended by appellants that the trial was held in their absence; that is to say, that stated proceedings of the trial occurred while they were absent from the courtroom. These proceedings, as shown by the record, were as follows: According to the clerk's transcript, it appears that, after the court had instructed the jury and some time after the jury had retired for deliberation upon their verdict "the jury returned into court for further instructions, thereafter they returned to the jury room." According to the reporter's transcript, referring to this same incident, "the jury was returned into court and the following proceedings were had and taken." Omitting matters not pertinent to the point now to be considered, these further proceedings were as follows: "The Court: Counsel will note the presence of all the jurors in the box? Ladies and Gentlemen of the Jury, do you desire something from the Court?" The fore-

man of the jury then stated a question relating to the instructions, and the court made its reply, which consisted merely of re-reading certain instructions theretofore given. Counsel for defendants then asked the court to re-read some of the other instructions, and the court read something further, which presumably was responsive to counsel's suggestion. The jury then retired for further deliberation.

It thus appears that the record of the proceedings does not contain the slightest suggestion that the defendants were absent from the trial or from any part thereof. The only excuse for the contention made by them is founded upon excerpts from the reporter's transcript relating to the proceedings on presentation of defendants' motion for a new trial. The record of those proceedings, so far as it relates to this question, is as follows:

"Mr. Belli: * * * The first point that has been filed in my memorandum here that the trial has been held in the absence of the defendants goes to the instructing of the jury while the defendants were in the anteroom and not in the courtroom. I believe there were some instructions, as shown in the record, given to the jury in the absence of the defendants, and it is my impression—I guess I haven't the case here to cite to your Honor this morning—it is my impression that the entire trial should be held in the presence of the defendants. Then the second point—

"The Court: Well, you were present, were you not?

"Mr. Belli: Yes.

"The Court: You did not either cite it as misconduct, as is very frequently done, or make an objection to it.

"Mr. Belli: I am making this for the purpose of the record now, more or less."

In the argument of counsel for appellants in his brief it is asserted that at the time of the proceedings both defendants were in an anteroom. His statement on the subject is as follows: "Appellants' case was greatly prejudiced while they were being detained by the guards, handcuffed in the anteroom out of sight of the jury in another room and out of sound of the proceedings entirely." There is nothing whatever in the record to justify the statement that defendants were out of sight of the jury or beyond hearing of the proceedings, even if, as now claimed, they were not actually within the courtroom. It affirmatively appears that in these proceedings appellants were adequately represented by counsel. They should not be permitted now to raise the objection, based upon their absence from the courtroom, without presenting a record sufficient to prove that fact. People v. Douglass, 100 Cal. 1, 34 P. 490; People v. Bealoba, 17 Cal. 389, 399; People v. Holmes, 118 Cal. 444, 449, 50 P. 675.

In this opinion we have discussed the questions arising upon the principal assignments of error on which appellants rely. The very slight emphasis which they have placed upon their few criticisms relating to refused instructions which they asked the court to give to the jury indicates that no reversible error was committed in the matter of instructions in the case, and this is confirmed by reference to the instructions themselves. We are satisfied that the defendants received the benefit of a fair trial, conducted according to law.

The judgments are and each of them is affirmed, and the order denying motion for a new trial is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.

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4 Cal.2d 511

BLODGETT et al. v. B. H. DYAS CO.

L. A. 15266.

Supreme Court of California.

Oct. 25, 1935.

1. Negligence 🔑67

Pedestrian who, in broad daylight, stepped into a store entry in which there was a stairway leading to the basement and fell down stairs, while she was looking at a show window and was paying no attention to where she was going, *held* contributorily negligent as a matter of law.

2. Negligence 🔑32(1)

Property owner, not being an insurer of invitee's safety, must only use reasonable care to keep premises in reasonably safe condition and give warning of latent or concealed perils, but is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed by invitee.

3. Negligence ⚷52
Storekeeper is under no duty to give warning in daytime to pedestrians of presence of stairway opening on street, since person walking through the streets is charged with knowledge that there are many open stairways leading to basements of mercantile establishments.

4. Negligence ⚷44
Failure of store owner to comply with ordinance requiring center handrail in stairway *held* not to authorize recovery for injuries by pedestrian falling down stairway, where lack of handrail was not the cause of pedestrian's fall into stairway.

5. Negligence ⚷136(26)
Store owner's failure to comply with ordinance requiring center handrail in stairway, which negligence was not the proximate cause of pedestrian's fall, *held* not to preclude court from finding pedestrian guilty of contributory negligence as a matter of law.

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In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Anna Blodgett and another against the B. H. Dyas Company. From judgment of nonsuit, plaintiffs appeal.

Affirmed.

Prior opinion, 40 P.(2d) 865.

F. E. Blodgett, Edward Fitzpatrick, and George R. Maury, all of Los Angeles, for appellants.

Joe Crider, Jr., of Los Angeles, for respondent.

PER CURIAM.

After a further consideration of the opinion of the District Court of Appeal, we are convinced that it has reached a correct conclusion therein. We therefore adopt said opinion, written by Justice pro tempore Edmonds of the Second District Court of Appeal, First Division, as the opinion of this court. It is as follows:

Plaintiff appeals from a judgment of nonsuit rendered against her in an action for personal injuries.

At the time of the accident she was walking east on Seventh street in downtown Los Angeles, looking into the show windows of the building occupied by the defendant. Somewhere near the center of this building on the Seventh street side there was a recess from which a stairway led to the basement. This recess from a point about five feet from the sidewalk which was immediately adjacent to the building was almost entirely occupied by the stairway, which was ten feet in width.

Plaintiff, intent upon a suit of clothes in the window, walked around the corner of the show window on Seventh street into the entry and stepped into the stairway, receiving injuries for which she claims damages. She testified that she did not look down at the pavement on which she was walking; that she did not see the stairway nor know it was there. Her entire attention was fixed upon the suit in the window.

[1] The evidence shows without conflict that plaintiff heedlessly walked into an open stairway in broad daylight. She was a pedestrian on a busy street, paying no attention whatever to where she was walking. The trial court properly granted defendant's motion for a nonsuit.

[2] The owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76.

[3] A person walking through the busy streets of a large city is charged with the knowledge that there are many open stairways leading to basements of mercantile establishments. There is no duty to give any warning in broad daylight of the presence of a stairway, and persons must use their eyes to protect themselves from such obvious dangers. Woolworth & Co. v. Conboy (C. C. A.) 170 F. 934, 23 L. R. A. (N. S.) 743; Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320.

The case of Murphy v. Broadway Improvement Co., 189 App. Div. 692, 178 N. Y. S. 860, upon which appellant chiefly relies, is not determinative of her case. The accident in that case occurred at night, in a stairway not in general use and eighteen inches inside the building line. It was held that the sufficiency of the light-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ing was a question of fact for the jury, the defendant owing the duty to maintain the entrance to the building passageway and lights so that they were reasonably safe for all persons using the premises and themselves exercising due care. In the present case, as has been stated, plaintiff by her own testimony showed an entire lack of care for her own safety.

[4, 5] The trial court received in evidence, over the objection of the defendant, an ordinance of the city of Los Angeles requiring a center handrail in stairways more than seven feet in width. The stairway into which plaintiff fell did not have such a rail. Plaintiff insists that by the violation of such ordinance defendant was guilty of negligence as a matter of law, and that she is therefore entitled to recover.

The evidence shows that the lack of the handrail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial. Even if the defendant was negligent in the violation of the ordinance, that fact would not preclude the court from finding that plaintiff was guilty of contributory negligence as a matter of law. Davis v. John Breuner Co., 167 Cal. 683, 140 P. 586; Wagy v. Brave, 133 Cal. App. 413, 24 P.(2d) 209. The undisputed evidence showing a lack of due caution on the part of the plaintiff precludes her right to recover. Bence v. Teddy's Taxi, 101 Cal. App. 748, 282 P. 392, 283 P. 86.

The judgment is affirmed.

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4 Cal.2d 499

HAMAKAWA v. CRESCENT WHARF & WAREHOUSE CO.

L. A. 15322.

Supreme Court of California.

Oct. 24, 1935.

1. Trial 🔑142

Verdict should be directed for defendant if, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deductible therefrom, evidence is insufficient to support verdict for plaintiff (Code Civ. Proc. § 629).

2. Negligence 🔑33(1)

Where plaintiff is on premises occupied by defendant without defendant's consent, defendant owes plaintiff duty only to refrain from inflicting willful or wanton injury and to conduct its activities with reasonable care for plaintiff's safety only after defendant discovers plaintiff.

3. Negligence 🔑32(2)

Where defendant did not expressly consent to plaintiff being in place where plaintiff was at time of injury and plaintiff was there for personal reasons having no connection with defendant's business, there could be no implied consent to plaintiff's presence within area occupied by defendant.

4. Negligence 🔑32(1)

Existence of defendant's duty to refrain from committing negligent acts which might injure plaintiff presupposes that plaintiff was rightfully where he was at the time and that his right to be there equaled defendant's right to occupy premises.

5. Wharves 🔑21

Where visitor to ship, without obtaining permission from stevedore using dock to load ship, to use visitors' passageway through warehouse to ship, proceeded along dock and was injured by bale of paper falling off balcony of warehouse when bale was struck by sling operated by stevedore in loading ship, visitor *held* "trespasser" and not entitled to recover for injury since he had no right to be on dock.

[Ed. Note.—For other definitions of "Trespasser," see Words & Phrases.]

6. Negligence 🔑28

Test for determining liability to person injured while using premises is whether defendant engaged in commission of negligent act knew of, or had reason to expect, presence of person injured within range of his negligent activities.

7. Negligence 🔑33(1)

Rule of nonliability for injury to trespasser may be invoked by owner of premises or person having permissive control thereof.

8. Wharves 🔑21

Stevedore having permissive control of dock for loading ship could invoke rule of nonliability so as to preclude recovery by trespasser struck by bale of paper falling off balcony of dock warehouse when it was dislodged by sling operated by stevedore in loading ship.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by N. Hamakawa against the Crescent Wharf & Warehouse Company, wherein verdict was entered for plaintiff. From an order denying a motion for judgment notwithstanding the verdict, defendant appeals.

Reversed.

For prior opinion, see 42 P.(2d) 1083.

George H. Moore, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff sued the defendant for damages for personal injuries sustained while he was about to board the Norfolk Maru, a freighter, docked at a municipal pier in Los Angeles harbor. The jury awarded damages to the plaintiff. The defendant moved in the alternative for a new trial and for judgment notwithstanding the verdict, a motion for a directed verdict having been made before the cause was submitted to the jury. The motion for judgment notwithstanding the verdict was denied, and the defendant has appealed from the order denying the motion.

[1] If the trial court should have granted the motion for a directed verdict, the defendant was entitled to a judgment non obstante veredicto. Code Civ. Proc. § 629. The court should have directed a verdict for the defendant if, disregarding conflicting evidence and giving to the plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. In re Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579.

The plaintiff is a fisherman. A sailor, member of the crew of the Norfolk Maru, invited him to come on board to inspect some goldfish which could be purchased. The sailor gave the plaintiff a card signed by himself purporting to be a pass to the ship which was docked at berth 230-D at the municipal pier. The plaintiff with two fishermen friends arrived at the pier in an automobile. A sign on the warehouse at the pier announced that parking of automobiles on municipal piers was absolutely prohibited. The plaintiff and his friends parked the car outside and walked along the pier outside the warehouse past berth 230-E toward the gangplank of the Norfolk Maru at berth 230-D. The defendant was a stevedoring concern and with the permission of the General Steamship Corporation, which had control of the dock, and of the shipowners, was engaged in loading cargo from a balcony of the warehouse above where the plaintiff and his friends were walking, into the hold of the Norfolk Maru. When the plaintiff was within the area occupied by the defendant, an empty sling which was returning from the ship to the balcony struck a bale of paper on the balcony and caused the bale to fall on the plaintiff, causing him the injuries for which he sought redress.

[2] If the facts disclose only that the plaintiff was on the premises then occupied by the defendant without its consent, express or implied, the defendant owed the plaintiff no legal duty except to refrain from inflicting upon him any wilful or wanton injury (Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; Powers v. Raymond, 197 Cal. 126, 131, 239 P. 1069), and to conduct its activities with reasonable care for his safety only after it knew or from facts within its knowledge should have known of the plaintiff's presence. 2 American Law Institute, Restatement of the Law of Torts, § 346; Lucas v. Walker, 22 Cal. App. 296, 134 P. 374, 379; Pomponio v. New York, N. H. & H. R. Co., 66 Conn. 528, 34 A. 491, 32 L. R. A. 530, 50 Am. St. Rep. 124; Sage's Adm'r v. Creech Coal Co., 194 Ky. 415, 240 S. W. 42.

[3] That the defendant gave no express consent to the plaintiff's presence in the place where he was at the time of his injury is conceded, and that the plaintiff was there for a private purpose having no connection with either the business of the defendant or the ship is not disputed. There was therefore no implied consent to the plaintiff's presence within the area occupied by the defendant. The question then is resolved by the state of the record on the inquiry, having in mind the governing rule hereinabove stated, whether the defendant knew or from facts within its knowledge should have known of the plaintiff's presence, or should reasonably have expected him to be where he was. As to the evidence in the record tending to prove that it did not know nor become aware of

the plaintiff's presence in fact, there is no conflict.

[4] The existence of any duty owing by the defendant to refrain from committing negligent acts calculated to cause injury to the plaintiff presupposes that the plaintiff was rightfully where he was at the time (Lucas v. Walker, supra; Herold v. P. H. Mathews Paint House, 39 Cal. App. 489, 179 P. 414; Sage's Adm'r v. Creech Coal Co., supra; Sughrue v. Booth, 231 Mass. 538, 121 N. E. 432), and that his right to be there was at least equal to the right of the defendant licensee to occupy the premises. Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092; Commonwealth Electric Co. v. Melville, 210 Ill. 70, 70 N. E. 1052.

[5] The uncontradicted evidence is that the General Steamship Company had general control of the dock and that all visitors to the Norfolk Maru were required to obtain a permit from the office of that company, which was in the pier warehouse, before boarding the ship. The plaintiff testified that he knew that he should obtain permission from that office to go on board. He did not apply at the office nor obtain that permission. It was undisputed that visitors, upon applying to the office, were conducted over a safe passageway through the warehouse to the ship, and that such passageway did not traverse the portion of the premises occupied by the defendant. The conclusion from these facts is inescapable that the plaintiff had wandered into a portion of the premises where he had no right to be and where the defendant did not know, and had no reason to expect, him to be at the time he was injured. In this state of the factual situation the plaintiff would not be entitled to recover for an act of negligence of the defendant. Lindholm v. Northwestern Pac. R. Co., 79 Cal. App. 34, 248 P. 1033. As declared in such cases as Kennedy v. Chase, 119 Cal. 637, 52 P. 33, 63 Am. St. Rep. 153, Medcraft v. Merchants' Exchange, 211 Cal. 404, 407, 295 P. 822, and Bush v. Weed Lumber Co., 63 Cal. App. 426, 433, 218 P. 618, the plaintiff might be an invitee or a licensee as to a portion of certain premises, and a trespasser upon another portion thereof. The facts in the present case do not admit of any different conclusion than that the plaintiff was a trespasser upon the portion of the premises occupied by the defendant, and upon which he was at the time the injury occurred, and the trial court, upon such showing, should have directed a verdict for the defendant.

[6-8] The plaintiff urges that only the owner of the property may invoke the rule limiting liability as to trespassers. He cites 45 C. J. p. 786, § 191; Fitzpatrick v. Penfield, 267 Pa. 564, 109 A. 653; and other decisions in support of the rule that the defense of no liability for injury to a trespasser is personal to the owner of the premises trespassed upon and does not inure to the benefit of strangers to the title, adjoining owners or other trespassers. The principle invoked by the plaintiff is well supported by authority but it is not applicable to the facts presented here. In none of the cases referred to, with the exception of the case of Guinn v. Delaware & A. Tel. Co., 72 N. J. Law, 276, 62 A. 412, 111 Am. St. Rep. 668, which is shown by a note in 3 L. R. A. (N. S.) 988 to be opposed to the weight of authority, did it appear that the defendant as against the plaintiff had any greater or exclusive right to the premises, and in none of them was the plaintiff shown to have been a trespasser as against the person charged with liability. In the final analysis, as recognized by those same authorities, the test is whether the defendant engaged in the commission of the negligent act knew of or had reason to expect the presence of the person injured within the range of his negligent activities. In 45 C. J. p. 786, it is also stated: "But ownership of the property trespassed upon is not an absolute test, for the rule of nonliability may be successfully invoked by one who, although not the owner of the property on which the injury occurred, had rights therein superior to those of the trespasser who was injured * * *." The invocation of the rule of nonliability may be made by the owner or the person who has the right of control of the premises. 45 C. J. p. 787, and cases cited. That the defendant stood in that relation to the plaintiff under the facts here cannot be questioned.

The order denying the defendant's motion for judgment notwithstanding the verdict is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

4 Cal.2d 575

RANDELL et al. v. RANDELL et ux.

L. A. 15085.

Supreme Court of California.

Nov. 4, 1935.

1. Partition ⇨83

In partition suit where referee allowed value of $100 per share for water stock that was valueless because water could be obtained through inclusion of partitioned lands in water district, allowance by court to plaintiff of cash difference between amount of stock awarded him and lesser amount awarded defendants *held* erroneous, where original division was corrected by court and it did not appear that there was an additional allotment of realty to defendants to make up supposed difference.

2. Appeal and error ⇨204(2)

Where plaintiff under agreement operated ranch which was being partitioned, objections to accounts kept by him which went to their foundation and authentication could not be made on appeal of partition suit, where no objection was made as to manner of proof at time they were admitted.

3. Appeal and error ⇨907(4)

Where accounts kept by plaintiff who under agreement operated ranch which was being partitioned were not brought up in record on appeal, Supreme Court assumed that trial court acted properly on entire record before it.

4. Partition ⇨114(4)

Implied finding that plaintiff's charge for his services as supervisor of ranch which was partitioned was reasonable *held* improper, where only evidence as to reasonable value of his services as supervisor showed that experienced man, able to do physical labor as well as supervise, could have been obtained for less than amount charged.

5. Partition ⇨114(4)

Presence and litigation of controversial issues between parties to partition suit *held* not to preclude allowance of attorney's fees for services connected with such issues, where services were found to be for common benefit of parties.

6. Partition ⇨114(4)

In partition suit, where defendants introduced no evidence and made no argument as to what would constitute reasonable fee for services rendered by plaintiffs' attorney for common benefit of parties in division of common property, allowance by trial court of $2,500 for such services *held* not abuse of discretion.

7. Appeal and error ⇨624

Request for transcript filed on tenth day after denial of motion for new trial *held* sufficient to extend time for requesting transcript (Code Civ. Proc. § 953a).

◆

In Bank.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action to partition real and personal property by George H. Randell and another against Ralph Randell and wife. From an adverse judgment, defendants appeal.

Judgment reversed, and cause remanded.

Drumm, Tucker Martell & Drumm and Sharpless Walker, all of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

THOMPSON, Justice.

This is an appeal from a final judgment of partition. The property partitioned is an orange ranch of about 80 acres, originally owned in common by the plaintiff George H. Randell, his son, the defendant Ralph Randell, and his daughter Laura, who transferred her interest to the plaintiff. By the interlocutory judgment, entered April 3, 1931, and confirmed upon appeal by his court (Randell v. Randell, 219 Cal. 95, 25 P.(2d) 416), the common property was found to consist of the ranch, 114 shares of stock in the John T. Carpenter Water Company, and $3,400 in cash, as shown by the account of George H. Randell. The parties were found to be operating the property under a written agreement with respect to their interests therein, and the plaintiffs were declared to be the owners of an undivided 55/100 and the defendants of an undivided 45/100 part thereof. The court further found that the plaintiffs were entitled to a partition as prayed, ordered a partition, and appointed a referee.

The plaintiffs filed exceptions to the referee's report, but the defendants did not. At the hearing on plaintiffs' exceptions it appeared that prior to the making of the report, the realty had been incorporated in a water district and the water stock had become valueless, or of nominal value only, whereas the referee had put on it a value of $100 a share. For this reason the court was of the opinion that another reference was necessary, since the change in the water rights would in all probability materially affect the value of the realty. But plaintiffs having waived all objections to the values placed upon the realty by the referee and defendants having filed no objections at all, the court modified the referee's report as proposed by the plaintiffs in a summary of claims which they had filed at the court's request; the order reciting that, under the circumstances, the court considered the proposed modifications entirely equitable. Neither the "Referee's Report of Findings and Division" nor respondents' objections thereto have been included in the record, but the referee, Finley, was present and testified at the hearing for confirmation. It appears that the allotment of lands and the valuations placed upon them by the referee remain unchanged, but the owelty due to respondents was increased on account of the erroneous valuation of the water stock by the referee.

The referee alloted parcels A and B to the plaintiffs and parcels C, D, E, and F to the defendants. While the valuation allowed to each of these parcels does not appear, it does appear from the testimony of the referee that parcels A and B were improved by being planted to oranges; that parcels C and D were partly improved and parcels E and F had been allowed no value at all. The water stock was allowed a value of $100 a share by the referee and 70 shares were allotted to the plaintiffs and 44 shares to the defendants; the division being made not entirely on the basis of the 45 per cent. and 55 per cent. interests of the parties, but partly on the basis of the acreage under cultivation which had been allotted to each one and taking into consideration the fact that the defendants had received less irrigated land. Then, in order to completely balance the division, since the land could not be divided exactly into the desired proportions, the referee allotted to the plaintiffs $1,300 out of the $3,400, which was the balance still available out of a $17,000 mortgage on the property, the remainder to be divided between the parties in the ratio of 45 per cent. to 55 per cent. The referee testified that he used the water in arriving at the valuation of the lands, but gave the water stock a valuation in addition to that. It is not disputed that the water stock has no substantial value; the water now being obtained through the inclusion of the partitioned lands in the water district which succeeded to the facilities of the water company. The court so found and awarded the stock to the parties as closely as possible on a 55 per cent.-45 per cent. basis; 63 shares to the plaintiffs and 51 to the defendants. The court further found that parcels A and B did not constitute 55 per cent. of the real property to be partitioned, and that partition could not be made equal without compensation, and adjudged compensation on account of the inequality. Included in the money judgment is an award of $2,581.03, charged to defendants as 45 per cent. of the excess of expenses over income ($5,735.62) since the original accounting prior to interlocutory judgment. The total, $6,580.03, corresponds to the total set out in plaintiffs' summary of claims in accordance with which the court modified the referee's report. It must be assumed that the items are also the same. The plaintiffs' itemized claims are as follows:

Value of all the land to be partitioned	$69,401.00	
55 per cent.	38,171.00	
Plaintiffs' award (parcels A and B)	36,772.00	
Deficit in award to plaintiffs		$1399.00
Award of water stock at $100 a share		
Plaintiffs (70 shares)	$ 7,000.00	
Defendants (44 shares)	4,400.00	
Differential adverse to plaintiffs		$2,600.00
Excess of expenses over income (including $3,400 on hand at time of interlocutory)	$ 5,735.62	
Plaintiffs' share or 55 per cent.	3,154.59	
Defendants' share or 45 per cent.		$2,581.03
Total		$6,580.03

[1] Appellants first complain of the item of $2,600 allowed to plaintiffs on the stock award made by the referee. This allowance is plainly unwarranted. In the first place the division of the stock made by the referee was not allowed to stand but a new division was made by the court in accordance with the percentages established by the interlocutory judgment. Moreover, had the original award remained unchanged, the plaintiffs would only be entitled to an allowance for the difference charged to them on the award of the water stock had there been an additional allotment of realty to the defendants for the purpose of making up this supposed difference. It does not appear that this was done. On the contrary, it appears from the summary prepared by plaintiffs that the real property allotted to them fell only $1,399 short of constituting 55 per cent. of the total. This sum of $1,399 was like-

wise allowed them by the court and the appellants concede this sum to be proper with respect to the division of the premises. Disregarding the stock entirely, it thus appears that plaintiffs have received their full 55 per cent. of the real property. They are not harmed by having received more than their share of the worthless stock in the beginning nor by the court's dividing it up in the correct proportions. No allowance is therefore necessary or proper on account of the erroneous valuation of the water stock by the referee.

Coming to the item of $2,581.03 for the appellants' share of the excess of ranch expenses over income from the entry of the interlocutory judgment, the court found that since the original accounting the plaintiffs had expended $17,524.39 for necessary care, upkeep, improvement, and maintenance of the property partitioned, and the defendants had expended nothing; that the plaintiffs were chargeable with $11,788.77 received from the ranch and that defendants had received nothing; that the total excess of expenses (including the sum of $3,400 available from the loan) over income of $5,735.62 had been paid by plaintiffs and that there was due to the plaintiffs from the defendants 45 per cent. of the excess of such expenses, or $2,581.03.

These findings were made upon statements which the plaintiff George H. Randell testified were accurate copies of his accounts. The defendants waived objection to the form of proof and the only objection to the introduction of the accounts was made upon the ground that a tenant in possession has no right to an accounting or contribution from his cotenant, in the absence of an agreement. Admittedly the interlocutory decree, affirmed by this court, established the operation of the ranch under an agreement between the parties and the right of the plaintiffs to an accounting and contribution from the defendants. The trial court on this hearing ruled, against the contention of the defendants, that the contract had not been terminated either by the action for partition, the interlocutory judgment or a letter written by the defendants thereafter, attempting to avoid liability for future operation, but could, in the absence of a breach by one of the parties, only be terminated by mutual consent of the parties or final decree in partition. Appellants have not seriously renewed their argument as to the propriety of any accounting but, on the appeal, have confined their objections to the insufficiency of the accounting made and to the item for the services of the plaintiff George H. Randell.

[2, 3] Appellants object to the accounts introduced on the ground that it was not shown that the plaintiff knew how to keep books or that they were properly and accurately kept; that the accounts were taken from books of original entry; that all the alleged expenses were necessary and reasonable or applied upon the common property; that all the receipts from the ranch or the bank or all repayments to the bank from the receipts of the ranch or that all advances by the bank for labor, taxes, water assessments, etc., which the bank had a right to make under its mortgage were shown therein; that the accounts were confusing and unintelligible and it did not appear how the money was furnished for the ranch or who was entitled to credit therefor. There were three accounts covering different periods of time. George H. Randell testified that they were accurate copies of books kept by himself, the entries being made by him at the time of the transaction; that he used the double entry system, crediting himself and debiting the ranch for his expenditures and debiting himself with amounts he received for the cotenancy; that the system of accounting and care of the ranch was the same as at the time of the previous trial; that the items of expenditure were for the care and upkeep of the ranch and were fair and reasonable; that money received from the bank was credited to the place and debited as payments were made on the obligations to the bank; that he had advanced the difference personally and that since the end of 1931 the bank had taken all receipts from the ranch and had also paid out various sums for labor, etc. Many of these objections go to the foundation and authentication of the accounts, and no objection was made as to the manner of proof at the time they were admitted. For the rest, the accounts themselves are not brought up in the record on appeal and we must assume that the trial court acted properly on the entire record before it.

[4] For part of the period George H. Randell charged the cotenancy with $200 a month for his services, thereafter at the rate of $125. That he was entitled to an allowance for his services under the

agreement was settled by the affirmance of the interlocutory decree; the charge made in the accounts prior to the interlocutory decree, however, being only $50 a month. The work was mainly of a supervisory or managerial nature; Randell being too advanced in years for active physical labor. The only evidence as to the reasonable value of his services was offered by defendants, who produced testimony that an experienced man who could do the physical labor as well as the supervising could be hired in that vicinity for from $75 to $80 a month. On this state of the record we must conclude that the implied finding that the allowance to plaintiff for his services was reasonable is unsupported by the evidence.

[5, 6] The court further found that the plaintiffs had been obliged to retain and employ attorneys for the purpose of "bringing and prosecuting this action to obtain a partition of the aforesaid property, and the services of said counsel were for the common benefit of the parties hereto," and that "the sum of $2,500.00 is the reasonable value of the services of said attorneys herein," and that 45 per cent. of this sum should be borne by the defendants. The appellants object that it was not found what services were for the common benefit of both parties in the partition proceedings proper as distinguished from controversial issues connected with the accounting and the allowance for water stock. It is obvious from the finding recited and the language of the decree, giving judgment "for the further sum of $1,235.25, being 45% of (1) $170 paid to Col. S. H. Finley, Referee herein, (2) $75 paid to Orange Title Company for abstract of title, and (3) $2,500.00 reasonable counsel fee, all of which said sums were incurred and expended by the plaintiffs for the common benefit of the parties hereto," that the court intended to find that the services for which the counsel fees were allowed were for the benefit of both parties. Defendant introduced no evidence and made no argument at the time of trial on the question of what fees should be allowed or what would constitute a reasonable fee, but, on the contrary, expressed himself as being satisfied to leave that matter to the discretion of the trial court. The presence and litigation of controversial issues between all the parties does not preclude the allowance of attorney's fees for services connected with such issues where such services are found to be for the common benefit of the parties. Capuccio v. Caire, 215 Cal. 518, 11 P.(2d) 1097. In the absence of evidence on the question we cannot say the trial court abused its discretion in allowing $2,500 as fee for such services as were rendered by the plaintiffs' attorney for the common benefit of both parties in the division of the common property.

Appellants' last point is that plaintiffs were not entitled to a money award growing out of the accounting but only to an additional award of property and they suggest parcel C, valued at $4,612.50 by the referee, as an additional allotment to plaintiffs with owelty in favor of the defendants if necessary. Appellants' argument is that by the interlocutory decree, and the prior decision of this court affirming it, it was determined that the contract, which the trial court here ruled to be still continuing in effect, governed the interests of the parties; the relevant provision being that the interests of the parties should be determined by their contributions, services and expenditures being held to be included within the term "contributions." Appellants' interpretation of the contract and the prior decision of this court is that when one of the tenants in common has made more than his share of necessary contributions he is entitled, not to enforce reimbursement from the others, but to an increased interest in the common property; that the interlocutory decree fixed the interests of the parties at 45 per cent. and 55 per cent. in accordance with their respective contributions made up to that time, and, under the contract of the parties, contributions made since the date of the interlocutory decree must be credited in the same way, by an increased interest in the property.

Respondents' only answer to this argument is that appellants in their objections to the findings and conclusions of law asked the court to grant owelty to the respondents, and cannot now complain. This statement does not square with the facts. Appellants in their objection to the proposed conclusion of law with respect to the money judgment of $6,580.03 in favor of respondents merely asked that it be reduced to the sum of $1,399, the amount by which the property awarded to respondents admittedly failed to meet the required proportion of 55 per cent., and this on the ground that the allowance of other items was improper. On this hypothesis it would have been unfair to ask the respondents to accept land valued at $4,612.50 and to pay the difference between that valuation and $1,399 as owelty to the appellants. In "Plaintiffs' Summary" of claims we find this: "Second: We would prefer judgment for the difference in money due plaintiffs, in the nature of owelty, instead of having us given Parcel 'C' at a valuation of $4,612.50," and "if the court decides the plaintiffs should take Parcel 'C' instead of cash, then Parcels 'A', 'B' and 'C' and the difference of $6,580.03 and the value placed on 'C' of $4,612.50, or $1,967.53 should be awarded to the plaintiffs." It further appears from the summary that this represented a change of front and that plaintiffs had previously urged the distribution of Parcel C to them, but had changed their minds due to their straitened circumstances caused by the heavy expenditures to which appellants had failed to contribute. From the order modifying the referee's report, it appears that the court for this reason considered the award of parcel C to the defendants, with a judgment of $6,580.03 for the plaintiffs, to be equitable. Had all the items allowed respondents by the trial court been substantiated by the record, the appellants must have prevailed on this point, in view of the contract of the parties and the prior determination of this court. However, it now appears that the allowance to the respondents must be considerably reduced and probably will fall well below the value fixed for parcel C. What will be the more equitable disposition of parcel C cannot be determined in advance of the final settlement of respondents' accounts.

[7] Respondents have made a motion to strike the transcript on the ground that the request therefor was not given within the time required by section 953a of the Code of Civil Procedure. The record discloses that a motion for a new trial was denied on August 10th and the request was filed August 20, 1934. Without analyzing the right of appellants to a new trial under all the circumstances here involved, we think it clear the proceeding was sufficient to extend the time for requiring the transcript. The motion is denied.

The judgment is reversed and the cause remanded to the trial court for a determination of the reasonable value of the services of George H. Randell and the disposition of parcel C in accordance with such determination and the views herein expressed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.

9 Cal.App.2d 657

JONES v. RICHARDSON, State Building and Loan Commissioner, et al.

Civ. 9421.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

1. Building and loan associations 🔑45(1)

Liability of building and loan commissioner and surety on his official bond for wrongful appointment of receiver under trust deed, while liquidating building and loan association, must be based upon tort as for malicious prosecution, where no indemnity bond was given (Code Civ. Proc. §§ 566, 1058; Gen. Laws 1931, Act 986, § 13.11 et seq.).

2. Malicious prosecution 🔑16

No action will lie for wrongfully appointing receiver unless appointment is charged as abuse of process, and want of probable cause and malice must be clearly alleged and proved.

3. Building and loan associations 🔑45(1)

Complaint merely alleging that building and loan commissioner wrongfully and without sufficient cause procured appointment of receiver under trust deed held by building and loan association in liquidation *held* insufficient to state cause of action, in suit by property owner against commissioner and surety on his official bond (Code Civ. Proc. §§ 566, 1058; Gen. Laws 1931, Act 986, § 13.11 et seq.).

4. Building and loan associations 🔑45(1)

Building and loan commissioner, acting as liquidator of building and loan association, is not liable for mere mistake of judgment in procuring appointment of receiver under trust deed (Code Civ. Proc. §§ 566, 1058; Gen. Laws 1931, Act 986, § 13.11 et seq.).

5. Building and loan associations 🔑45(1)

Building and loan commissioner is liable for damages only as an individual for action taken as liquidator of building and loan association, where no legislative act authorizes action for damages against him in his official capacity (Code Civ. Proc. §§ 566, 1058; Gen. Laws 1931, Act 986, § 13.11 et seq.).

◆

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Harvey M. Jones against Friend W. Richardson, as State Building and Loan Commissioner, and another. From a judgment of dismissal, plaintiff appeals.

Affirmed.

George R. Maury, C. S. Wagner and Vernon Day, all of Los Angeles, for appellant.

James C. Ingebretsen, of Los Angeles, for respondent Richardson.

Joe Crider, Jr., of Los Angeles, for respondent American Bonding Co. of Baltimore.

SHINN, Justice pro tem.

Defendant Friend W. Richardson, as building and loan commissioner of the state of California, acting as liquidator of United Building & Loan Association, brought an action for specific performance of a trust deed upon real property improved with an apartment and store building owned by plaintiff. On June 17, 1932, by ex parte order, the superior court, upon application of the commissioner, appointed a receiver who qualified, entered into possession of the property, and collected the rents therefrom. On June 23 a motion to vacate the ex parte appointment was denied, and the appointment was confirmed. An appeal taken by Harvey M. Jones, plaintiff herein, from that order was later dismissed on stipulation. The commissioner acquired title to the property under trust deed sale September 19, 1932; the receiver was discharged October 19, 1932; and on March 27, 1933, counsel for the commissioner filed an order with the clerk for the dismissal of the action. Notwithstanding the dismissal, the case was noticed for trial on April 5, 1933, at which time the court ordered the action dismissed and gave judgment in favor of Harvey M. Jones for costs.

This action is brought against the defendant Richardson as building and loan commissioner and against American Bonding Company of Baltimore, surety upon the commissioner's official bond, to recover damages in the amount of the alleged rental value of the premises during the time the receiver was in possession. In addition to the foregoing facts, the complaint alleges that the receiver was appointed wrongfully and without sufficient cause. When the present action was brought to trial upon the complaint and the answers of the defendants, a motion was made by the defendants to exclude evidence upon the ground that the complaint failed to state a cause of action against either defendant. The court granted this motion and rendered judgment of dismissal of the action, from which plaintiff appeals.

[1, 2] The complaint is defective in several particulars. It was evidently drawn upon the theory that defendant Richardson and the surety upon his official bond were under the same liability as a principal and surety who give the indemnity bond required by statute upon the appointment of a receiver. Such is not the case. This is not an action brought upon an undertaking given upon the appointment of a receiver, required by section 566 of the Code of Civil Procedure, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of the receiver, in case the appointment has been procured wrongfully, maliciously, or without sufficient cause. In bringing the action and procuring the appointment of a receiver, defendant Richardson was acting in his official capacity in the exercise of powers conferred upon him as commissioner by the Building and Loan Association Act (Deering's Gen. Laws, 1931, Act 986, pp. 459, 507, § 13.11 et seq.). No undertaking was given under section 566 nor was one required of the commissioner, a state officer. Section 1058, Code Civ. Proc.; Mercantile Trust Company v. Miller, 166 Cal. 563, 137 P. 913.

The liability of those who give the statutory indemnity bond, as principal or sureties, is created by contract, and the action for damages is upon the contract. Here there was no undertaking, and, if any liability exists, its foundation is in tort as for malicious prosecution. It has been held that, where an injunction bond is given, the parties causing the injunction to be issued incur no obligation on the bond if they do not become parties to it, and the liability is that of the sureties alone. Lindsay v. Flint, 4 Cal. 88. No action will lie for improperly suing out an injunction unless it is charged as an abuse of the process of the court, through malice and without probable cause. Robinson v. Kellum, 6 Cal. 399. Want of probable cause and malice are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action. Asevado v. Orr, 100 Cal. 293, 34 P. 777. These authorities apply with equal force to applications under which receivers are appointed.

[3] The allegation in the complaint that defendant Richardson "did wrongfully and without sufficient cause procure the appointment of the said receiver," while stating facts essential to a complaint in an action upon a statutory indemnity bond, is by no means sufficient to charge malice or want of probable cause in the appointment of the receiver. The appointment might have been procured wrongfully and without sufficient cause, and yet in the highest good faith and with the best of motives.

[4] Furthermore, the duties of the building and loan commissioner are such as to require the constant exercise of discretion and judgment. In many situations his decisions are necessarily of a judicial nature. In prosecuting the action in question and in procuring the appointment of a receiver, he was acting in the exercise of his judgment as a public officer and within his jurisdiction. If he is charged with anything at all except the diligent discharge of his duties, in good faith, it is with an error of judgment in a matter of procedure in a lawsuit. There is no liability upon the part of a public officer under such facts. 21 Cal. Jur. 911; Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489; Green v. Swift, 47 Cal. 536; Ballerino v. Mason, 83 Cal. 447, 23 P. 530; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48. See, also, Pearson v. Reed (Cal. App.) 44 P.(2d) 592.

[5] We are cited to no legislative act authorizing an action for damages against the building and loan commissioner, in his official capacity, in the absence of which there exists only the right to sue him as an individual. 21 Cal. Jur. 910; 23 Cal. Jur. 580-582.

The bond upon which defendant American Bonding Company of Baltimore became surety was conditioned that the principal as building and loan commissioner would well, truly, and faithfully perform the duties then required of him by law and such additional duties as might be imposed upon him by law. Since there was no violation of official duty, there was no breach of the condition of the bond (People v. Smith, 123 Cal. 70, 55 P. 765), and no cause of action was stated against the surety.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

HAMMOND et al. v. STANLEY et al.

Civ. 10525.

District Court of Appeal, Second District,
Division 2, California.

Nov. 4, 1935.

Hearing Granted by Supreme Court
Jan. 2, 1936.

Mortgages 🔑559(2)

Statute precluding deficiency judgment on trust deed obligations unless notice of breach and election to sell was recorded one year before sale *held* inapplicable to trust deeds and notes which were executed prior to effective date of statute (Civ. Code, § 2924½, as added by St. 1933, p. 1674, § 8).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Karl R. Hammond and another against Rowland P. Stanley and another. From a judgment, plaintiffs appeal.

Reversed.

Voorhees & Voorhees, of Los Angeles, for appellants.

George W. Burch, Jr., of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The sole question involved on this appeal is whether section 2924½ of the Civil Code, as added by St. 1933, p. 1674, § 8, applies to trust deeds and notes which were executed prior to its effective date. If the section is applicable to such paper, the judgment should be affirmed; if it does not apply to such paper, the judgment should be reversed. This court has taken the position that the Code section does not apply to such paper which was executed prior to its effective date, and the reasons are set forth in the recent case of Bankers Life Co. v. Canterbury et al. (Cal. App.) 50 P.(2d) 83.

Judgment reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

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9 Cal.App.2d 317

PEOPLE v. GROVES.

Cr. 2704.

District Court of Appeal, Second District, Division 2, California.

Oct. 19, 1935.

1. Courts 🔑486

Finality is intended to accompany judgments of District Courts of Appeal where appeal is directed to that court, and rehearing is granted in Supreme Court only where error appears on face of opinion or where doubtful and important question is presented.

2. Courts 🔑106

Appellant *held* not entitled to have District Court of Appeal set out instructions and evidence in its opinion for purpose of hearing in Supreme Court, where appeal was taken directly to District Court of Appeal.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 49 P.(2d) 888.

Richard H. Cantillon, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

PER CURIAM.

In a petition for rehearing the defendant contends that this court "should set forth the two instructions offered by the defendant, determine whether or not both, or either of them, are correct statements of the law, *recite the evidence* adduced by the defendant in support of his theory, and then point out specifically in its decision wherein this theory was covered by the trial court's instructions * * *," i. e., set out in addition certain instructions given by the trial court. He also contends that this court should "set forth in its decision in substance the testimony of the witness, the physician, admitted into evidence by the trial court, the objections made thereto and the rulings of the trial court upon the objections * * *." Otherwise, the appellant contends, "he is precluded from and deprived of his *right* to a review by the highest court" for the reason that this case came by direct appeal to this court rather than from the Supreme Court and that in this type of case when a petition for hearing in that court is presented, that tribunal does not look to the underlying record but solely to the opinion. The defendant presents with such assurance and with such a degree of sincerity his contention that he is being deprived "of his right to a review by the highest court" that we feel impelled to state the reasons for denying him a rehearing.

[1, 2] In a case such as this where the appeal has been directly to this court the purposes of a hearing in the Supreme Court are to enable that court "in its discretion, to supervise and control the opinions of the several District Courts of Appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the Constitution, statutes, and charters, and in some instances a final decision by the court of last resort of some doubtful or disputed question of law." People v. Davis, 147 Cal. 346, 81 P. 718, 719. "The existence of this power [of transfer] and its exercise for the purposes last stated do not give a *right* of appeal from the District Courts of Appeal to the Supreme Court, nor anything which is in legal effect equivalent thereto. * * * *The District Courts of Appeal are established for the purpose of ascertaining and enforcing according to the rules of law the particular right of each case committed to their arbitrament.* The state has done its full duty in pro-

viding appellate relief for its citizens, when it has provided one court to which an appeal may be taken as of right. There is no abstract or inherent right in every citizen to take every case to the highest court." People v. Davis, supra. Finality is intended to accompany the District Court's judgments in such cases. It is for this reason that the Supreme Court on a petition for hearing does not concern itself with the correctness of the decision on the case made out in the record or as between the parties. The Supreme Court has said: "In such cases a rehearing in this court is granted only when error appears upon the face of the opinion of the appellate court, or when a doubtful and important question is presented [upon the face of the opinion] upon which we desire to hear further argument." Burke v. Maze, 10 Cal. App. 206, 101 P. 438, 440, 441, opinion of Supreme Court, attached, in denying a transfer.

Of course, the rule is different in that class of cases where the right of review is vested in the Supreme Court upon direct appeal and where the Supreme Court has transferred the cause to one of the District Courts of Appeal for decision. When a case of the latter class is presented to the Supreme Court by a petition for hearing, the grounds upon which it may be granted are not confined to considerations arising out of the validity of the decision *as a precedent.* The Supreme Court will and sometimes does examine and determine the validity of the decision as between the parties as well as on the case stated in the District Court's opinion, and the determination of whether or not a transfer should be made will sometimes depend on a review of the entire case as such. But the case before us is not such a case.

We must keep in mind, as heretofore stated, that under the theory of our appellate system, justice and due process are satisfied if the unsuccessful litigant is given *one* opportunity for review by a higher court, and that finality is intended to accompany the judgments of the District Courts of Appeal. The Supreme Court should not be required to review the case unless the opinion contains a bad precedent. And the defendant does not claim that any error appears upon the face of the opinion or that a doubtful and important question appears upon the face of the opinion. Manifestly the matters which he wishes set out would not be of interest to the general public. It is not logical to argue that because the judgments of this court are intended to be final therefore the facts should be set out in the opinions of the court in great detail or that they should be set out in greater detail than in those cases where the right of appeal was directly to the Supreme Court. The reasoning and logic are the other way around. If the judgments in this class of cases *are* intended to be final, and if the precept be true which we hear over and over again from the platforms of bar associations and in the law journals that "brevity of opinions is a cardinal virtue second only to clearness," then a correct decision with a short, clear statement of the reasons for the decision as contemplated by the Constitution is all that should be expected. Such a decision was rendered herein. The practice of writing short opinions in this class of cases will save the Supreme Court an endless amount of work in passing upon petitions for hearing in that tribunal. Furthermore, our observation is that it is not the short opinion which the Supreme Court takes from us for review, but those long opinions which attempt to "strut like peacocks, tail feathers widely spread." In the meantime, as the result of putting into practice the views above expressed, our court is fully up with the work. All cases are on the calendar which have been not already submitted. On the day cases are filed they are set for hearing for the first Friday after the lapse of the necessary eighty days required for briefs.

9 Cal.App.2d 517

GILBANK v. BENTON.

Civ. 10495.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1935.

Rehearing Denied Nov. 5, 1935.

1. Creditors' suit ⚿1

Nature and purpose of a creditor's bill is to enable creditor to apply to payment of his debt property of judgment debtor, which by its nature cannot be taken in an execution at law, or to convert holder of a legal estate into a trustee, and call for a conveyance, or to have it sold in satisfaction of his claim, or to aid creditor in reaching property of debtor by removing fraudulent judgments or conveyances which defeat his remedy at law.

2. Bankruptcy ⚿196

Judgment creditor who had levied upon property of debtor and who, a third party having claimed such property, had followed procedure provided in statute for determining title in such case *held* upon institution of proceedings to determine title to have acquired an equitable lien upon property originally levied upon, which was superior to claim of trustee in bankruptcy of judgment debtor where petition in bankruptcy was filed more than four months after institution of proceedings to determine title (Code Civ. Proc. § 689, as amended by St. 1933, p. 1887).

3. Execution ⚿344

Statement in sheriff's certificate that he had released property levied upon by instructions from plaintiff's attorney *held* not binding upon court, in action by trustee in bankruptcy of judgment debtor to recover property levied upon, since rights of attaching creditor are dependent upon what sheriff has actually done, not upon return he may have made.

4. Execution ⚿129

Where greater part of debtor's property sought to be levied upon was not capable of manual delivery, levy accomplished by sheriff leaving with person in possession a copy of writ of execution and notice that property was levied upon in pursuance of writ *held* valid, at least as to such part not capable of manual delivery, even though sheriff had thereafter withdrawn keeper whom he had placed in charge of property (Code Civ. Proc. § 542, subd. 6, as amended by St. 1933, p. 1860).

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by O. T. Gilbank, as trustee in bankruptcy of the estate of the Ruether-Graham Feed Company, Limited, against Roy F. Benton. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Cosgrove & O'Neil, of Los Angeles, for appellant.

Harry Ashton, of Los Angeles, for respondent.

WOOD, Justice.

Defendant obtained a judgment in November, 1933, against Ruether-Graham Feed Co., Limited, hereinafter referred to as the feed company. He secured a writ of execution, and on February 21, 1934, the sheriff levied upon certain property of the feed company which defendant claims to be not capable of manual delivery. A keeper was placed in charge of the property, and on February 24, 1934, one Wheeler filed with the sheriff his verified third party claim to the property levied upon. The sheriff promptly notified defendant of the third party claim and demanded that an undertaking in the sum of $40,000, twice the alleged value of the property, be delivered to him. Defendant did not present the undertaking nor furnish further funds to the sheriff to pay the expenses of the keeper. The sheriff withdrew the keeper on February 26, 1934, and on the same day defendant filed with the court a petition for an order to determine title under the provisions of section 689, Code of Civil Procedure, as amended by St. 1933, p. 1887. The court issued its order fixing March 15, 1934, as the date for the determination of title. The court further ordered that pending the determination of title "no transfer or other disposition of the property hereinabove described be had." On March 2, 1934, a copy of the order of the court was served on Wheeler and on the feed company. Thereafter, upon the hearing of the order for determination of title, the court rendered judgment that the feed company was the owner of the property in question, subject to certain rights of Wheeler as assignee of conditional sales vendors. On April 9, 1934, the property was sold to defendant at sheriff's sale. The feed company, upon filing its voluntary petition in bankruptcy, was on July 5, 1934, adjudged a bankrupt. This action was commenced by plaintiff as trustee in bankruptcy of the estate of the feed company against defendant for the purpose of recovering the property in dispute for the benefit of the bankrupt estate, claiming that defendant had no lien senior to the rights of the other creditors of the feed company. The trial court found the value of the property to be $7,500 and rendered judgment in plaintiff's favor for the return of the property or, in the alternative, for damages in the sum of $7,500.

In prosecuting this appeal defendant contends that the proceedings taken by him pursuant to the provisions of section 689, Code of Civil Procedure, were in the nature of a creditor's bill, which subjected the assets of his judgment debtor to the lien of his judgment and that he thereby obtained an equitable lien upon such assets prior to March 5, 1934, and consequently more than four months prior to the adjudication of the feed company as a bankrupt. Plaintiff concedes in his brief that "a judgment creditor by filing a creditor's bill to subject the assets of his judgment debtor to the lien of his judgment thereby obtains an equitable lien upon such assets," and that "the equitable lien created by filing of a creditor's bill is superior to the claim of the trustee in bankruptcy of the judgment debtor where the petition in bankruptcy is filed more than four months after the filing and serving of the creditor's bill." Plaintiff, however, vigorously takes issue with the contention of defendant, that the proceedings taken under section 689, Code of Civil Procedure, constituted a statutory creditor's bill. He concedes that "proceedings under section 720, Code of Civil Procedure, under the decisions of the courts of last resort of this state, constitute a statutory creditors' bill," but he argues that the same rule does not apply to proceedings under section 689, Code of Civil Procedure. He frankly states: "If it is conceded, and it certainly is not, that a 'Petition to Determine Title Under Section 689, Code of Civil Procedure,' has the same legal effect as proceedings under section 720, Code of Civil Procedure, the appellant should prevail."

The provisions of section 720, Code of Civil Procedure, and of section 689, Code of Civil Procedure, are almost identical in purpose and in the remedy provided. Section 720 has been placed in the Code under the chapter entitled "Proceedings Supplemental to Execution." It provides that if it appears that any person during the course of the proceedings appears to have property of the judgment debtor or that he claims an interest in the property adverse to the judgment debtor, "the judgment creditor may maintain an action against such person * * * for the recovery of such interest; * * * and the judge or referee may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge or referee granting the same, or the court in which the action is brought, at any time, upon such terms as may be just." Section 689 has been placed in the Code in the chapter entitled, "Execution," this chapter, like the chapter entitled, "Proceedings Supplemental to Execution," being in that part of the Code under the general title, "Execution of Judgment in Civil Actions." Section 689, as amended in 1933 (St. 1933, p. 1887), now provides that whenever a verified third party claim is served, the plaintiff shall be entitled to a hearing within 20 days in order to determine title to the property in question. If the plaintiff "gives the undertaking mentioned above to have the property held, such third person may initiate similar proceedings to determine title." The section further provides: "The court may order the sale of any perishable property held by such officer and direct the deposit of the proceeds of such sale, and may, by order, forbid a transfer or other disposition of the property until the proceeding, herein provided, for the determination of such title, can be commenced, and prosecuted to termination. Such order may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending at any time, upon such terms as may be just. Upon the termination of such proceedings the court may make all proper orders for the disposition of such property or proceeds." It will be noted that in the most essential part of this section the Legislature has followed almost verbatim the language of section 720. Before the amendment of 1933, section 689 did not contain a provision enabling the court to "forbid a transfer or other disposition of the property" pending the determination of title. In the case of Duncan v. Superior Court, 104 Cal. App. 218, 285 P. 732, decided in 1930, it was held that if a party proceeding under this section did not present the undertaking, the statute contained no provision whereby the sheriff might retake the property or whereby the court could impound the property. Apparently the Legislature amended the section in 1933 for the purpose of supplying the defects in the statute which had been pointed out in the Duncan Case.

[1, 2] An excellent statement concerning the uses of a creditor's bill is found in Frankel v. Boyd, 106 Cal. 608, 611, 39 P. 939, 940: "The nature and purpose of a creditor's bill is to enable the creditor to apply to the payment of his debt property of the judgment debtor, which by its nature cannot be taken in an execution at law, or to convert the holder of a legal estate into a trustee, and call for a conveyance, or to have it sold in satisfaction of his claim, or to aid the creditor in reaching property of his debtor by removing fraudulent judgments or conveyances which defeat his remedy at law." In our opinion a creditor who follows the proceedings set forth in section 689, Code of Civil Procedure, as amended, obtains an equitable lien in like manner as a creditor who follows the proceedings set forth in section 720, Code of Civil Procedure.

[3] Plaintiff relies upon the finding of the trial court to the effect that the levy of execution was released "by reason of instructions of said plaintiff's attorney." This finding is not supported by the evidence. It is true that the sheriff certified that he had released the property "by instructions from plaintiff's attorney." It was established by uncontradicted evidence at the trial that no instructions on the subject were given by plaintiff's attorney. It is apparent that the true reason for the withdrawal of the keeper before the expiration of the period in which an undertaking could be given was the failure to deposit the necessary funds for maintaining a keeper. The statement in the sheriff's certificate was admitted over defendant's objection. In Braden v. Cline, 51 Cal. App. 424, 196 P. 913, 914, the court said: "In support of plaintiff's contention that the lien was lost by abandonment and surrender of possession of the property by the sheriff, his affidavit to that effect was received in evidence over defendant's objection. This ruling undoubtedly was error." Even if it be conceded that the statement in the certificate was admissible it would not be binding upon the court. The rights of an attaching creditor are dependent upon what the sheriff has actually done and not upon the return he may have made. Brusie v. Gates, 80 Cal. 462, 22 P. 284. The sheriff's opinion as to the legal effect of his acts, whether correct or erroneous, does not form any part of his return, and will not affect the rights of any party to the action. Hooper v. McDade, 1 Cal. App. 733, 82 P. 1116.

[4] The evidence shows without contradiction that most of the property in question was not capable of manual delivery. Some of the articles levied upon were hay grinding machinery, conveyor and motor, weight 11,500 pounds, which would take two men a full day to remove, and to remove which one end of the building would have to be knocked out, this equipment being set in a concrete floor and held in place by screws; a steel boiler, embedded in brick, weight 10,000 pounds, which would take three men three days to remove; a molasses pump, weight 600 pounds, set in concrete floor with screws, and located underground. A number of other very bulky articles were levied upon which were attached to a concrete floor by screws. Without giving a detailed list of the articles levied upon, it can fairly be stated that most of them were such as should be classified as property not capable of manual delivery.

The sheriff left with the person in possession of the property a copy of the writ and a notice that the property in his possession was levied upon in pursuance of the writ. Since the greater part of the property was not capable of manual delivery, the levy, at least as to such part, was valid in accordance with the provisions of subdivision 6 of section 542, Code of Civil Procedure, as amended by St. 1933, p. 1860. In Irilarry v. Byers, 84 Cal. App. 28, 257 P. 540, 541, it is said: "There is no necessity for an actual handling of heavy and unmanageable articles to levy or maintain an attachment. * * * It is not requisite to the attachment of personal property not capable of manual delivery that it be taken into custody by the sheriff, nor that, having been taken by him, his possession be retained." It follows that a valid levy having been made more than four months before the adjudication of bankruptcy, defendant's claims to priority should have been upheld.

In the preservation of the property defendant expended a sum found by the court to be in excess of $1,200. In its judgment the court did not provide that plaintiff should reimburse defendant for these expenditures as a condition of recovering the property. Defendant now insists that in any event he should be reimbursed for his "out-of-pocket" expenditures. In view of our holding that the court erred in rendering judgment for the plaintiff, it becomes unnecessary to pass upon this point.

The judgment is reversed, with directions to the trial court to enter judgment in favor of defendant.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

9 Cal.App.2d 590

SWERDFEGER v. UNITED ACCEPTANCE CORPORATION et al.

Civ. 1149.

District Court of Appeal, Fourth District, California.

Oct. 23, 1935.

1. Appeal and error 🔑1008(3)

Under contract providing that marketing corporation's charge for preparing grower's crates of lettuce for shipment should not exceed 75 cents per crate, trial court's interpretation of provision that corporation was permitted to make charge for actual expense incurred in having lettuce packed, which was in no event to exceed 75 cents per crate, and that provision was not an agreement for allowance of fixed charge of 75 cents per crate *held* not so unreasonable or so clearly inconsistent with intent of parties as to justify disturbance by appellate court.

2. Contracts 🔑229(2)

Contract provision whereby lettuce grower agreed to pay marketing corporation 15 per cent. of "f. o. b. price" as commission *held* not to entitle corporation to charge commission on expense of "top icing" the lettuce, where evidence showed that expense of "top icing," although paid in first instance by corporation, was charged to buyer to whom lettuce was consigned and was paid by buyer as item of shipping expense.

Term "f. o. b." has a commercial significance which is quite generally accepted by courts without proof. It is undisputed that the letters composing the expression consist of a convenient abbreviation of the words "free on board," which mean that the seller is to place merchandise on board at his own expense on account of the person for whom they are shipped.

[Ed. Note.—For other definitions of "F. O. B." and "Free on Board," see Words & Phrases.]

3. Contracts 🔑229(2)

Under contract whereby lettuce grower, in consideration of extra advance, agreed to pay marketing corporation 10 per cent. of net profits of crop, trial court properly construed term "net profits" to mean whatever amount was left after all various expenses incident to growing of lettuce crop and its marketing had been subtracted from gross receipts, so as to entitle grower to deduct from gross profits as costs obligations which grower incurred for labor, mule rent, and feed.

[Ed. Note.—For other definitions of "Net Profits," see Words & Phrases.]

4. Accord and satisfaction 🔑26(3)

Evidence *held* to sustain trial court's finding that lettuce grower's cashing of check received from marketing corporation did not constitute "accord and satisfaction" of grower's claim against corporation.

Evidence disclosed that at the close of the season covered by the contract the marketing corporation submitted to the grower a final statement which showed that corporation was indebted to grower in the sum of $547.69, and that there was attached to the statement a check for such amount drawn payable to grower's order; that the grower expressed to a third person dissatisfaction with the amount for which check was drawn; that the person to whom grower voiced his dissatisfaction suggested that if grower cashed the check it would amount to a settlement of the account; that grower then stated that he was in pressing need of money and did not wish to delay cashing of check; that the check which bore on its face the words "To balance accounts" was cashed by grower prior to the time that he notified corporation of his dissatisfaction; and that grower, a few days after check was cashed, consulted an attorney who addressed a letter to the corporation explaining grower's dissatisfaction with the amount paid him and calling attention to certain specific items for which grower claimed he should have received credit.

[Ed. Note.—For other definitions of "Accord and Satisfaction," see Words & Phrases.]

5. Appeal and error 🔑878(6)

Plaintiff who did not appeal from judgment rendered in his behalf could not claim in appellate court that judgment was insufficient.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by W. A. Swerdfeger against the United Acceptance Corporation and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

Glassford & Smith, of El Centro, for respondent.

JENNINGS, Justice.

The plaintiff, who is a lettuce grower in Imperial county, entered into a written agreement with the defendant on May 15, 1929, relative to the sale of lettuce which was to be grown by plaintiff during the following autumn on land leased by him. By the terms of this contract defendant agreed that it would advance to plaintiff an initial amount of $15,050, and that it would make an additional loan to plaintiff of the sum of $35 per acre. Payment of the latter advancement was to be made by defendant in installments as the season should progress and plaintiff would require additional financing for the proper care and cultivation of the crop. The plaintiff, on his part, agreed that he would place the entire crop of lettuce to be grown by him on the land described in the contract in defendant's hands to be packed, shipped, and marketed by the latter, and that from the proceeds obtained from the sale of the lettuce he would repay to defendant the various amounts advanced to him, together with interest thereon at the rate of 8 per cent. per annum and a commission of 15 per cent. of the sale price for defendant's services rendered in the packing, shipping, and marketing of the lettuce. At the close of the season defendant submitted to plaintiff a statement which showed that it was indebted to plaintiff in the sum of $547.69. Attached to this statement was a check drawn payable to plaintiff's order for the aforementioned amount. The plaintiff, although he expressed dissatisfaction with the amount for which the check was drawn, cashed the same, and thereafter instituted this action to recover from defendant the sum of $12,248.93. The action was tried before the court without a jury. Upon the conclusion of the trial, judgment was entered in plaintiff's favor for the sum of $2,007.91. From this judgment the defendant appeals.

On this appeal the defendant attacks the allowance of three distinct items whose total is the amount specified in the judgment. The defendant further contends that the evidence established an accord and satisfaction.

The first item to which objection is made is the sum of $1,537.40 which the trial court allowed as a rebate on the charge made by defendant for packing the lettuce. It is undisputed that the total number of crates of lettuce that were packed and marketed by defendant was 30,748. The court allowed plaintiff a rebate of 5 cents per crate on the charge for packing. The rebate was allowed because the undisputed evidence showed that defendant actually paid the firm that did the work of packing at the rate of 70 cents per crate, whereas it charged plaintiff at the rate of 75 cents per crate.

Defendant's charge for packing was made in accordance with a clause of the contract between the parties which is in the following language: "The party of the first part agrees to grade, ice, pack, and load said lettuce on board cars for the account of and at the expense of the party of the first part. It is agreed however that said charge, which includes crates complete, paper for lining crates, ice and labor shall not exceed the sum of seventy-five cents (75c) per crate, which the party of the second part agrees to pay and such charge is to be deducted from money received from sale of said lettuce."

The trial court evidently construed the above-quoted language as meaning that defendant was permitted to make a charge for the actual expense which it incurred in having the lettuce packed which was in no event to exceed 75 cents per crate, and that it was not an agreement for the allowance of a fixed charge of 75 cents per crate irrespective of the actual expense incurred.

Defendant contends that the evidence showed that the price generally charged for packing lettuce during the season of 1929–30 was 75 cents per crate, and that it was able to have the work performed at the rate of 70 cents per crate because it agreed to lend its credit to the packer to enable it to obtain materials required for the work. The evidence sustains defendant's contention that it was able to procure the doing of the work at the less rate by agreeing to lend its credit to the packer to render possible the purchase of necessary supplies which the packer was not financially able to obtain on its own credit. The evidence also showed, however, that the packer paid in full for all supplies that were used in the work of packing, and that defendant sustained no loss because of its agreement to lend its credit to the packer.

[1] It is our conclusion that the trial court's interpretation of the above-quoted language of the contract is not so unreasonable or so clearly inconsistent with the intent of the parties, as disclosed by their language, that we are required to substitute therefor the interpretation insisted upon by defendant. In such a situation a reviewing court is not justified in disturbing the construction adopted by the trial court. Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; Kautz v. Zurich General Accident & Liability Ins. Co., 212 Cal. 576, 582, 300 P. 34; Manley v. Pacific Mill & Timber Co., 79 Cal. App. 641, 648, 250 P. 710; Whepley Oil Co. v. Associated Oil Co. (Cal. App.) 44 P.(2d) 670.

The second item to whose allowance defendant objects is the sum of $406.07 which the evidence disclosed consisted of commission at the rate of 15 per cent. charged by defendant on expense incurred for "top icing" the lettuce that was shipped. It is not disputed that the sum of $2,758 was paid by defendant for ice that was placed on top of the crates of lettuce in the cars in which it was shipped. The evidence also indicated that the expense of "top icing" was charged to the buyers of the lettuce, and that it was repaid by them to the defendant. During the trial, the defendant produced evidence which tended to show that it was the custom of lettuce shippers to "top ice" lettuce, that it was always done unless the buyer gave orders to the contrary, and that the selling price of lettuce included a separate charge for "top icing" which was collected from the buyer. Evidence was also produced which tended to prove that defendant and one other similar concern operating in Imperial county charged a commission on the expense of "top icing."

In support of its contention that a commission on the above-described expense was justified and that the trial court therefore erroneously allowed plaintiff to recover it, defendant relies on the following provision of the contract: "The party of the first part agrees to ship and sell said packed lettuce for the account and at the risk of the party of the second part and it is mutually agreed and understood that the party of the first part is to receive from the party of the second part as commission therefor Fifteen per cent (15%) of the f. o. b. price at El Centro said commission to include brokerage, and other proper expenses incident to soliciting orders and selling said lettuce. The party of the first part agrees to use his best efforts and endeavors to sell said lettuce to the best advantage."

[2] It is not easy to understand defendant's reliance on the above-quoted language to sustain its contention that it was entitled to charge a commission on the expense of "top icing" the lettuce. It is there clearly stated that defendant is to receive for its services in shipping and selling the lettuce a commission of 15 per cent. "of the f. o. b. price at El Centro." The term f. o. b. has a commercial significance which is quite generally accepted by courts without proof. It is undisputed that the letters composing the expression consist of a convenient abbreviation for the words "free on board." The meaning of the term is that the seller is to place merchandise on board at his own expense on account of the person for whom they are shipped. Whitaker v. Dunlap-Morgan Co., 44 Cal. App. 140, 144, 186 P. 181. The evidence produced by the defendant showed, however, that the expense of "top icing," although paid in the first instance by defendant, was charged to the buyer to whom the lettuce was consigned and was paid by the buyer as an item of shipping expense properly chargeable to him. Under such circumstances it could manifestly not be included within the undisputed meaning of the term f. o. b., and the contract provision permitting the collection of a commission of 15 per cent. of the f. o. b. price did not entitle defendant to charge a commission on the expense of "top icing" the lettuce.

The third item of recovery to whose allowance defendant objects is the sum of $64.44 which defendant had charged as commission on the sum of $644.47 at the rate of 10 per cent.

The evidence which was produced relating to this last-mentioned item showed that as the lettuce growing season progressed plaintiff found himself in need of additional funds, whereupon he applied to defendant for a further loan, and in return therefor made the following agreement on December 21, 1929: "For and in consideration of an extra advance of $5.00 per acre on my lettuce contract No. 34, I hereby agree to pay The United Acceptance Corporation 10% of the net profits of this crop."

The plaintiff, over defendant's objection, was permitted to show that in the growing of the lettuce he had incurred obligations for labor, mule rent, and feed to the extent of $644.47 which were not paid by him until after the final statement was rendered by defendant and which were not deducted by defendant as costs from the gross profits derived from the sale of the lettuce, although the various items of expense were called to defendant's attention and the final statement was returned to defendant for correction.

[3] It is apparently defendant's contention, with respect to this particular charge, that the various items of expense incurred by plaintiff in the growing of the lettuce and which had not been paid by defendant or from the various advances made by defendant prior to the rendition of the final statement may not be considered in arriving at "net profits." It is urged that "net profit" could only be discovered by an examination of the various expenditures and advances covered by the contract, and should not be determined by permitting an allowance of any and all items of expense which plaintiff may have incurred. However, it must be observed that the term "net profits" is found in the aforementioned supplementary agreement whereby plaintiff agreed to pay defendant a commission of 10 per cent. of the "net profits of this crop." There is no reference to net profits in the main contract whereby defendant agreed to make certain advances and plaintiff agreed to pay a commission of 15 per cent. "of the f. o. b. price El Centro." It is therefore apparent that the additional 10 per cent. commission was to be calculated only on net profits. The trial court evidently construed the term "net profits" to mean whatever amount was left after all the various expenses incident to the growing of the lettuce crop and its marketing had been subtracted from the gross receipts. We entertain no doubt that this was a proper construction and that the court was justified from the evidence in allowing the item to which defendant objects.

The defendant further contends that the affirmative defense of accord and satisfaction was raised by the answer, and that the evidence showed that this affirmative defense was sustained.

The evidence respecting this feature of the case showed that at the close of the season covered by the contract the defendant submitted to plaintiff a final statement which showed that it was indebted to plaintiff in the sum of $547.69, and that there was attached to the statement a check for this amount drawn payable to plaintiff's order. The evidence also showed that plaintiff expressed to a third person his dissatisfaction with the amount for which the check was drawn, and that the person to whom plaintiff voiced his dissatisfaction suggested that if plaintiff cashed the check it would amount to a settlement of the account. The plaintiff then stated that he was in pressing need of the money and did not wish to delay cashing the check until he could discuss the matter with the defendant. The check which bore on its face the words "To balance accounts" was cashed by plaintiff prior to the time he notified defendant of his dissatisfaction, but it appeared that plaintiff consulted an attorney a few days after the check was cashed and the attorney addressed a letter to defendant explaining plaintiff's dissatisfaction with the amount paid him and calling attention to certain specific items for which plaintiff claimed he should have received credit.

[4] It is our conclusion that the trial court's finding that there was not an accord and satisfaction between the parties is supported by the evidence, and that defendant's objection thereto is not sustainable. The evidence showed that the defendant was the exclusive agent of plaintiff to pack, ship, and market plaintiff's lettuce. A different rule is therefore applicable to the situation than would apply if the relationship between the parties had been that merely of debtor and creditor. Egan v. Crowther, 74 Cal. App. 674, 241 P. 900. By its final statement defendant conceded that the money represented by the check belonged to plaintiff. When, therefore, plaintiff cashed the check and received the money he received nothing more than he was entitled to receive by defendant's express admission. Plaintiff was not obligated to return his own money to defendant under penalty of thereby ac-

knowledging that he was not entitled to any additional amount.

[5] Plaintiff attempts to raise an objection to the judgment, in that the court refused to include therein an additional allowance which plaintiff claimed he was entitled to recover. This he may not do. He has taken no appeal and is interested only in maintaining the judgment. Byxbee v. Dewey, 128 Cal. 322, 324, 60 P. 847; Rapp v. Southern Service Co., 116 Cal. App. 699, 708, 4 P.(2d) 195.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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9 Cal.App.2d 510

POMONA CITY SCHOOL DIST. et al. v. PAYNE, County Auditor, et al.

Civ. 10459.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1935.

Hearing Denied by Supreme Court Dec. 16, 1935.

1. Schools and school districts 🔑92(1)

School district is "public corporation" within statute providing that interest on deposits made pursuant thereto should belong to general fund of "public corporation" represented by officer making deposit (St. 1933, p. 642).

[Ed. Note.—For other definitions of "Public Corporation," see Words & Phrases.]

2. Schools and school districts 🔑92(1)

"Municipality" as used in statute authorizing deposit at interest in banks of moneys belonging to "municipality" is employed in generic sense, including all public corporations other than merely incorporated cities (St. 1927, p. 1389).

[Ed. Note.—For other definitions of "Municipality," see Words & Phrases.]

3. Schools and school districts 🔑92(2)

County treasurer by whom money belonging to school district which is maintained in county treasury is deposited in bank "represents" school district, funds of which are in his care, and acts as agent and ex officio treasurer for school district, "represent" meaning to exercise power derived from another (School Code, § 4.280, as amended by St. 1931, p. 2491, and § 4.991, as added by St. 1931, p. 722; St. 1927, p. 1389, as amended; St. 1933, p. 642; Const. art. 11, § 16½, as amended in 1932).

[Ed. Note.—For other definitions of "Represent," see Words & Phrases.]

4. Schools and school districts 🔑92(2)

Administrative construction of statute authorizing deposits in banks of funds in county treasury as to disposition of interest on commingled deposits of funds of school district and county funds *held* not persuasive as to proper construction of statute in view of diversity of construction among administrative officers (St. 1927, p. 1389, as amended; St. 1933, p. 642; Const. art. 11, § 16½, as amended in 1932).

5. Schools and school districts 🔑92(1)

Fiscal officers of county are ex officio officers of school district within county upon whom, with county, duty of custody and care of moneys deposited by school district is imposed without provision for compensation, reward, or emolument either to officers as such or to county.

6. Schools and school districts 🔑92(2)

School district maintaining funds in county treasury *held* entitled to interest earned on school funds commingled and deposited in bank with county funds by county treasurer in absence of statute that county should be entitled to all interest earned on such commingled funds deposited by treasurer (School Code, § 4.280, as amended by St. 1931, p. 2491, and § 4.991, as added by St. 1931, p. 722; St. 1927, p. 1389, as amended; St. 1933, p. 642; Const. art. 11, § 16½, as amended in 1932).

"Interest" is the accretion or increment to the principal fund earning it, and, unless lawfully separated therefrom, becomes a part thereof.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by the Pomona City School District and others against Herbert A. Payne, as County Auditor of the County of Los Angeles, and others. Judgment for defendants, and plaintiffs appeal.

Reversed, with directions.

Hearing denied by Supreme Court; SHENK and THOMPSON, JJ., dissenting.

Allard & Whyte, Joseph A. Allard, Jr., and William W. Shaw, all of Pomona, and Holbrook, Taylor, Tarr & Reed and W.

Sumner Holbrook, Jr., all of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondents.

GOULD, Justice pro tem.

Pursuant to section 4.280 of the School Code, as amended by St. 1931, p. 2491, and section 4.991, as added by St. 1931, p. 722 (Deering's Gen. Laws, 1931, vol. 3, pp. 3959, 4125, 4153), plaintiff school district, in common with other school districts within the county of Los Angeles, maintains its school funds on deposit in the treasury of said county. The county treasurer, acting under the provisions of section 16½ of article 11 of the State Constitution as amended, the Depositary Act of 1927 (Stats. 1927, p. 1389), as amended, and the Depositary Act of 1933 (Stats. 1933, p. 642), follows the administrative practice of depositing in state and national banks funds in the county treasury, regardless of the source from which said funds are derived. Such sums so deposited for the period from January 1, 1932, to January 1, 1935, were in excess of the moneys in said treasury derived from sources of revenue solely for the use of the county of Los Angeles, and necessarily at all times included school funds placed in the custody of the treasurer by various school districts. No part of the interest received from banks acting as depositaries of said funds is credited to any school district, but the whole thereof is placed in the general fund of the county exclusively for the use and benefit of said county.

Plaintiffs brought this action for a writ of mandate against the auditor and treasurer of Los Angeles county, asking that said officers be directed to credit to the Pomona City School District such interest as may have been earned by the funds of said district in the custody of said treasury and deposited in banks. Before the trial court the facts were presented by stipulation, it being agreed that for the three years in question certain average daily balances were maintained by Pomona City School District in the county treasury; that during said period certain interest earnings were received by the county treasurer from funds deposited in banks, and that the total bank deposits bore certain ratios to the total funds in the treasury. Applying a simple mathematical formula to these figures, the deduction followed that had Pomona City School District been credited with its proportionate share of the interest earnings, its funds would have been enriched by the sum of $4,551.06, and its prayer in this proceeding is that defendant county officers be compelled to make such manual and bookkeeping transfers as to place such sum to the use and account of plaintiff school district. Appeal followed the trial court's denial of relief.

Decision of this case we believe rests upon the determination of the status of the school funds while they are in the custody of the county. Is the county the owner of such funds, or is the county simply the trustee for the benefit of the school district? If the county is the owner, obviously the interest accretions belong to such owner; but as a trustee, the county would have no ownership in the funds or in their interest increments.

The matter has never been before the California courts for decision, but from appellate utterances in related or analogous cases both parties herein may derive solace for their divergent views. Thus in Buena Vista Water Storage District v. Shields, 126 Cal. App. 241, 14 P.(2d) 559, 564, 15 P.(2d) 861, where it was held that the county and not the district must stand the loss by robbery of funds from the county treasury, it is said that a certain argument advanced "presupposes that the money stolen from this county treasurer was the particular property of this district, a premise which we cannot accept." Such a statement, it is argued by respondents, necessarily repudiates the claim of joint interest in a common fund; and in the same decision the court, by analogy, compares the district depositing funds in the county treasury to a depositor in a bank.

Opposed to such cases as the foregoing, appellants point to holdings that swamp land district funds are "held by the state in trust" and that the officers of the county in handling such funds are mere agents of the state "and had no property right in the fund" (Miller & Lux v. Batz, 142 Cal. 447, 76 P. 42, 44); that excess unsecured property collections "are no part of the moneys of the city and county * * * and * * * it is in no sense a public fund of the city and county"; that "it is a trust fund" and "the treasurer is but a bailee" (Corbett v. Widber, 123 Cal. 154, 55 P. 764); that "the funds of the school district are not subject to the control of the county" (Pacific Mutual, etc., Co. v.

County of San Diego, 112 Cal. 314, 41 P. 423, 424, 44 P. 571), and that "the county, as such, has no interest in the funds of the high-school district" (Elberg v. County of San Luis Obispo, 112 Cal. 316, 41 P. 475, 476, 44 P. 572).

Conflicting authorities are gleaned from other states. State ex rel. School District v. McGraw, 74 Mont. 152, 240 P. 812, holds flatly that school district funds on deposit with the county treasurer "lose their identity as school district funds, and all that the school district thereafter has is a credit on the books of the county treasurer for the amount or amounts paid into the county treasury to the credit of the district; the money itself becomes the property of the county, or 'county funds.'" Directly contrary are such cases as Drainage District, etc., v. Ada County, 38 Idaho, 778, 226 P. 290, 293, emphatically declaring that "it is certainly not the intent of this statute, and not in accordance with justice, that the county should receive and retain interest on funds of the drainage district." Many of these out-of-state cases, however, arise under statutes dissimilar in many respects to those governing in California, and must be read with the statutory divergence in mind.

Until the constitutional amendment of 1906, see St. 1905, p. 1063 (section 16½, art. 11) and the subsequent legislative act (Stats. 1907, p. 974), public funds were required to be held intact in public treasuries. By the 1907 statute it was provided that moneys belonging to any county or municipality might be deposited at interest in banks. Section 16½ of article 11 of the Constitution was again amended in 1922 (see St. 1921, p. 2189), and in 1923 a new Depositary Act was adopted (Stats. 1923, p. 25) permitting the deposit of "all moneys belonging to or in the custody of any county or municipality." Section 1. The scope of the act was enlarged in 1927 (Stats. 1927, p. 1389) to include "all moneys belonging to or in the custody of any county, city and county, city, town, municipality or other political subdivision within the state" (section 1); and in 1933, pursuant to the 1932 amendment to section 16½ (see St. 1931, p. 3120), changes in the Depositary Act (Stats. 1933, p. 642) further broadened the classification by the use of the additional words "or other public or municipal corporation." Section 1. The acts of 1927 and 1933 governed the deposits in question in this proceeding. In the latter act it specifically provides that "interest on all moneys deposited as herein provided for shall belong to and shall be paid quarterly into the general fund of the county, city and county, city, town, municipality or other public or municipal corporation represented by the officer making such deposit." St. 1933, p. 643, § 2.

[1, 2] No counter argument can be heard to the proposition that a school district is a "public corporation" (Kennedy v. Miller, 97 Cal. 429, 32 P. 558), and it therefore falls within the classification of the 1933 act. Likewise, the fair and reasonable construction of the language of the 1927 act, where the word "municipality" is used in section 2 and other portions of the statute, impels the conclusion that this word is there employed in its generic sense to include public corporations other than merely incorporated cities. Indeed, school districts have been frequently defined as "quasi-municipal." Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A. L. R. 288; Pasadena School District v. Pasadena, 166 Cal. 7, 134 P. 985.

[3] Defendants emphasize the language of the statute that the interest earned shall belong to and shall be paid into the fund of the public body "represented by the officer making such deposit." The money is deposited by the county treasurer. It is pointed out, therefore, that the interest belongs to the county, being the public body "represented by" the county treasurer who made the deposit. This is too narrow a construction of the words "represented by." Certainly the county treasurer, as custodian of school funds, "represents," i. e., "exercises power derived from another" (Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157), the school district whose funds are in his care, and acts as its agent, and is ex officio treasurer for the school district.

[4] Both parties discuss the weight to to be given to contemporaneous administrative construction of the deposit acts by officials in various California counties. The rule followed by Los Angeles county, however, has not the sacrosanctity which universality might perchance lend to it, for in at least three counties of the state, the stipulation of agreed facts discloses, county treasurers do otherwise and allocate to school districts an aliquot share of interest earned on commingled deposits. We do not regard the point as controlling or helpful.

[5, 6] More weight is to be attached to the purpose which the voters had in mind in adopting the constitutional amendments referred to above. For instance, at the time the voters were urged to make the 1922 amendment the official "argument to voters" contained such expressions as the following: "As the section now reads, there is no authority for the deposit in local banks of any moneys belonging to school districts. * * * To correct this condition the amendment permits the deposit of such moneys under the same conditions as state, county and city moneys are deposited. * * * There is no reason why our school districts should not be placed in as favorable a position as the state, its counties and municipalities in this regard." It is unthinkable that when the constitutional amendments were adopted by the people under such representations as to the purpose of the amendments, the Legislature thereafter enacted the depositary laws herein involved in disregard of the purpose expressed by the voters. There can be no doubt whatever that the legislative intent in the two depositary acts with which we are concerned was to allow the deposit of school moneys in the same manner as county and city moneys, to earn interest for the benefit of the school district.

Defendants in effect argue that the Los Angeles county treasury is a bank in which numerous districts, cities, and political subdivisions of various types deposit their funds for safekeeping; that the relation of debtor and creditor between the county and the depositor is thereby established, and that the interest earned upon the moneys placed by the political subdivisions with the county belongs to the county, as a recompense or reward for its burden in assuming the care of the funds and being legally responsible to the depositors for the safe return of the same. This theory of recompense falls when we remember that the county treasurer has only been allowed to deposit such funds at interest in very recent years; that prior to the adoption of depositary legislation the county was obliged by law to assume all the burdens of safekeeping and redelivery of funds without any reward or compensation. Nothing in the wording of the depositary acts indicates that the county is to be paid by earned bank interest or otherwise for keeping funds of school districts and other political subdivisions, and we cannot read such intent into the legislative enactments. In fact, the rule of law would control that the right of depositors to their interest increments could not be taken away without direct statutory authority to that effect. We must assume that defendants, as county officers, are ex officio officers of plaintiff school district, and that as such officers the law imposes upon them and the county of Los Angeles certain duties and obligations, including custody and care of deposited moneys, for which the law provides no compensation, reward, or emolument either to the officers as such or to the county.

We are also confronted with the primary law that interest is an accretion or increment to the principal fund earning it, and unless lawfully separated therefrom becomes a part thereof. Lawson v. Baker (Tex. Civ. App.) 220 S. W. 260; 61 C. J. 1530. This was the common-law rule, and unless the depositary acts clearly demonstrate an intention to deprive school districts of such common-law right to interest accruals, they should retain such interest. It cannot be questioned that school funds as such remain the property of the school district, are not subject to the control of the county and that the county has no interest whatever therein. See cases, supra. No more, we believe, can the county, in the absence of clear statutory authority, assume to be the owner of the interest increments upon such funds. The reasonable and equitable rule is that the county is simply the agent of the school district, the bailee or trustee of the funds deposited in its care, and as such bailee and trustee it cannot allocate to itself, nor enrich its own coffers with, the interest increments upon the money placed in its custody by its bailor and trustor.

For these reasons, the judgment is reversed, with directions that judgment be entered for plaintiffs as prayed.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 580

ROBBINS et al. v. JENKINS.

Civ. 10383, 10542.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1935.

Rehearing Denied Nov. 9, 12, 1935.

1. Courts ⚿114

Court could make nunc pro tunc correction of order granting new trial to show that it was based on insufficiency of evidence to justify verdict, notwithstanding pendency of appeal from original order.

2. Appeal and error ⚿1015(2)

Action of trial court in granting new trial because of insufficiency of evidence to justify verdict *held* controlling, where record disclosed conflict in evidence.

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Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Eunice M. Robbins and another against Dr. R. B. Jenkins. From an order granting new trial after verdict for defendant, and from a nunc pro tunc order correcting the order granting motion for new trial, defendant appeals.

Appeal dismissed, and orders affirmed.

Mills, Hunter & Dunn and Noel B. Martin, all of Los Angeles, for appellant.

Monta W. Shirley and George W. Nilsson, both of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs, husband and wife, commenced the action against defendant, a surgeon, alleging that he performed an operation upon one of the plaintiffs, that he made an incision into her abdominal cavity, and in sewing up the wound negligently failed to remove certain sutures, resulting in damages to plaintiffs. Upon issue joined, the jury brought in a verdict for defendant. A motion for new trial was made on various statutory grounds, including insufficiency of the evidence to justify the verdict. On February 25, 1935, the motion for new trial was granted, the essential part of the minute order being: "After argument, it is ordered that the said motion be and the same is hereby granted." Defendant appealed from this order and filed his opening brief in this court on July 5, 1935. On motion of plaintiffs for an order to correct the order granting a new trial, the trial court on July 16, 1935, made an order which appears in the minutes as follows: "After argument, it is ordered that said motion be and the same is hereby granted nunc pro tunc to show that said motion for a new trial was granted on the insufficiency of the facts to justify the verdict." The trial judge on July 17, 1935, filed a written order setting forth, "it appearing to the court that by error of the clerk of department 17 of this court, the minute order of the 25th of February, 1935, failed to show that the motion was granted on the ground of insufficiency of evidence to justify the verdict", and providing that the minute order theretofore made be corrected nunc pro tunc to show that "one of the grounds for granting said motion is insufficiency of evidence to justify the verdict." From this order also defendant appeals.

Plaintiffs now present a motion to this court to dismiss the appeals and to affirm the orders of the superior court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Defendant resists the motion, contending that the trial court in its order of July 16, 1935, attempted to correct a judicial rather than a clerical error.

The point involved has come before the higher courts on a number of occasions, and in each instance the decision has been adverse to the contention of defendant. The last case on the subject, Carter v. J. W. Silver Trucking Company (Cal. Sup.) 47 P.(2d) 733, 736, was decided August 1, 1935. In that case the trial judge wrote on a "Submission Tag" the following words, "New trial before another court granted," and the clerk in entering the minute order on July 3 placed in the minutes the following: "It is ordered that a new trial in the above entitled actions before another court be and the same is hereby granted." A notice of appeal was served on July 10, and appellants took steps to prepare the record. On August 14, without notice to appellants, the trial judge signed an order amending the prior order nunc pro tunc to read: "New trial before another court granted on the ground of insufficiency of the evidence to justify the verdict." A motion by plaintiffs to vacate the nunc pro tunc order was denied. The Supreme

Court, in affirming the order, held that the right of the court to correct its record to conform to the facts and speak the truth was not suspended by the appeal. It was further held that the trial court "inadvertently omitted to state the particular ground on which it was granted." In King v. Emerson, 110 Cal. App. 414, 288 P. 1099, 1101, 294 P. 768, the trial court made a minute order merely providing that the motion for a new trial "be and the same is hereby granted." Later the court signed and filed an order correcting the former order nunc pro tunc to include as the ground for the granting of the motion the insufficiency of the evidence to sustain the verdict. In upholding this order the reviewing court said: "The amount and kind of evidence requisite to satisfy that court as to what was the real order of the court and what was the proper entry on the minutes must rest with the court and be decided upon the evidence adduced. In this connection, the judge may rely upon his own memory. The court is not precluded from correcting the entry because the 'record' does not show that it is itself incorrect." In Haynes v. Los Angeles R. R. Corp., 80 Cal. App. 776, 252 P. 1072, 1073, the trial court made its order on July 21, 1923, granting a motion for a new trial in this language: "Said motion for a new trial be and the same is hereby granted." From this order defendant appealed and prepared and served its bill of exceptions which was stipulated as correct by the plaintiff and certified by the judge to be correct. The defendant then filed its opening brief on appeal and thereafter, on July 18, 1924, on motion of plaintiff, the trial court made an order nunc pro tunc correcting the minutes of the court "to conform to the facts" of the case and providing that the motion be granted "upon the grounds of the insufficiency of the evidence to sustain the verdict, and that the verdict is against law." In upholding the order of the trial court, the reviewing court said: "It is also contended by the defendant and appellant in this case that, an appeal having been taken from the original order granting a new trial, the trial court lost jurisdiction over the order and had no power to thereafter change or alter it. This contention is based upon the theory that the error was a judicial error and not a clerical error, but, as we have already determined that it was undoubtedly a clerical error, there is no merit in this contention."

[1, 2] From the foregoing authorities it is clear that the trial court was within its rights in correcting the order granting the new trial to include insufficiency of the evidence to justify the verdict. The voluminous record discloses a conflict in the evidence of the respective parties, and, such being the case, the action of the trial court is controlling.

The appeals are dismissed, and the orders appealed from are affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

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9 Cal.App.2d 523

PEOPLE v. McKINNEY.

Cr. 2766.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1935.

1. Weapons 🔑17(5)

Whether defendant possessed "sap," which was found in a suitcase under a bed in a room occupied jointly by him and another man, *held* for jury (Gen. Laws 1931, Act 1970, § 1; Pen. Code, § 1126).

2. Weapons 🔑6

Possession of "sap" could be proved without proof of ownership, since although ownership implies right to possess, possession may exist entirely apart from ownership (Gen. Laws 1931, Act 1970, § 1; Civ. Code, § 654).

> "Possession" is defined as a detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name.
>
> [Ed. Note.—For other definitions of "Possession," see Words & Phrases.]

3. Weapons 🔑7

Conviction for possession of a "sap" *held* sustainable though no proof of malicious intent by defendant was proved and no actual wrongful use was shown, since proof of possession alone is sufficient (Gen. Laws 1931, Act 1970, § 1; Civ. Code, § 654).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Kenneth W. McKinney was convicted of having a black-jack in his possession, and he appeals.

Judgment affirmed.

Olin N. Mackay, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Accused by information, tried by a jury, and found guilty of having in his possession what is commonly known as a "sap" or black-jack, defendant appeals to this court upon the sole ground that there was not sufficient evidence introduced at his trial to sustain the verdict of the jury. Mere possession of a black-jack or similar instrument is denounced as a felony by the Deadly Weapons Act (section 1, Act 1970, Deering's Gen. Laws 1931, p. 900).

[1] The instrument in this case was found, not on the person of defendant, but in a suitcase under the bed in a room occupied jointly by him and another man. Defendant denied he had ever seen the "sap" before it was produced at his preliminary hearing. His roommate refused to testify regarding it upon the ground that such testimony might incriminate him. Police officers testified that defendant had admitted to them at or shortly after his arrest that the instrument belonged to him.

[2] Possession may be proved without proof of ownership, and although ownership implies the right to possess (Civ. Code, § 654), possession may exist entirely apart from ownership and ownership may be had of a thing not in the owner's possession. Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L. R. A. 788. Under the statute involved here, possession alone had to be proved, and Bouvier defines possession as "the detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name." We feel that under the evidence presented here the question of defendant's possession of the "sap" was one of fact, properly presented to the jury for determination. Likewise as to the evidence generally, while it is true that the jury might have been justified in rendering a different verdict, the problem of determining questions of fact is left entirely to it (Pen. Code, § 1126), and with such determination this court may not interfere in the face of conflicting evidence.

[3] That no malicious intention on the part of the possessor of the interdicted weapon was proved, and that no actual wrongful use was shown, avails appellant not at all. Proof of possession alone is sufficient.

On principle this case is not unlike the "metal knuckles" case (People v. Ferguson) reported in 129 Cal. App. at page 300, 18 P.(2d) 741, upholding a conviction where nothing more than ownership and possession was shown and where there was no showing of evil intent or wrongful use.

The judgment is affirmed.

We concur: WOOD, J.; CRAIL, P. J.

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9 Cal.App.2d 712

In re MURPHY'S ESTATE.

MURPHY v. MURPHY.

Civ. 9963.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1935.

Wills 🔑849

Brother of testator, for whom no provision was made in testator's will, *held* entitled to entire estate as descendant of testator's mother who was sole legatee under will and who predeceased testator (Probate Code, § 92).

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Louis Russell Murphy, deceased, wherein William L. Murphy claimed the entire estate, and wherein Florence I. Murphy, guardian of the persons and estates of Mary Elizabeth Murphy and others, minors, petitioned for the entire estate. Decree for petitioner, and relator appeals. Reversed.

Elmer P. Delany, of San Francisco, for appellant.

William A. O'Brien and Rogers, Clark & O'Brien, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Josephine Murphy executed her last will on August 4, 1927. Her son Louis Murphy executed his last will six days later. The mother died on March 15, 1932; the son died five days later. The mother left her entire estate to Louis, and purposely omitted to provide for another son, William L. Murphy, "he having heretofore received certain advances from me." In Louis' will the entire estate was left to the mother, and he expressly omitted to provide for his brother William.

Because the sole legatee under Louis' will predeceased him, the brother, as next of kin to Louis, claims the entire estate under section 92 of the Probate Code. The three minor children of William appeared by their mother as guardian and petitioned for the entire estate upon the ground that William could not take under the statute because of the expressed intention of the testator to eliminate him as an heir to the estate.

Section 92 reads in part: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, * * * such descendants take the estate so given by the will." The section is modeled on the former section 1310 of the Civil Code, with no change of language which would affect the interpretation for the purposes of this case.

The authorities interpreting the old section do not pass directly on the point involved here, but the reasoning in Estate of Hittell, 141 Cal. 432, 75 P. 53, must control the decision. In that case the testator had left his entire estate to two strangers of the blood, Anna and Mary, and had expressly excluded a brother, a sister, and other named heirs at law. Mary predeceased the testator, and the probate court distributed the entire estate to Anna on the theory that the devise to Anna and Mary vested in them a joint tenancy with a right of survivorship. In reversing the decree the Supreme Court said that the reference in the will by the testator to his relatives did not express an intention that they should not share in his estate under any circumstances whatever, but that the testator's intention was that they should not share if both Anna and Mary should survive him. In this connection the court said, 141 Cal. 432, at page 436, 75 P. 53, 54: "As in the case of innumerable wills, the testator did not anticipate changed conditions, and did not provide for the event of the death during his lifetime of one of the named devisees, which he could easily have done, if he so desired, by giving the property to them, or to the survivor of them. What his actual intent may have been after the conditions were changed by the death of Mary, we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. He may have thought that one-half of his estate would be sufficient for the wants of the remaining woman. At all events, we must apply the law to the will as it reads, and the fact of the death of Mary before that of the testator; and, thus applying it, the conclusion clearly follows that the living devisee, Anna, took one undivided half of the estate, and that the other half vested in the heirs at law."

There is no language which would convey an intention on the part of the testator to "substitute another" in the words of the code section if his mother should predecease him; but, so far as appears from the document itself, it is reasonable to assume that the testator intended in that event to let the law take its course. We are faced with these inescapable facts: The devisee died during the lifetime of the testator, and the will does not show an intention to substitute another in her place. The estate would therefore go to her lineal descendant, the appellant herein, by operation of the statute. Thus, in effect, the statute substitutes the appellant for the deceased devisee, and it is immaterial whether we say he takes by reason of the will or by operation of the statute. The controlling point is that the will did not provide for the contingency of the death of the devisee and the statute supplies that omission.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

9 Cal.App.2d 731

COFFEY v. SLINGERLAND et al.

Civ. 10510.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1935.

Rehearing Denied Dec. 3, 1935.

Hearing Denied by Supreme Court Jan. 2, 1936.

1. Negligence 🔑**6**

Violation of ordinance or statute is negligence per se.

2. Negligence 🔑**121(1)**

Presumption of negligence arising from failure to perform duty imposed by law is not conclusive but may be overcome by evidence that such failure was excusable or justifiable.

3. Negligence 🔑**82**

To bar recovery, negligence of plaintiff must have proximately contributed to injury.

4. Municipal corporations 🔑**706(8)**

In pedestrian's action for injuries received when struck by bicycle while crossing intersection, where evidence was conflicting as to whether plaintiff crossed intersection in violation of ordinance, instructions relating to presumption of negligence arising from violation of ordinance, evidence necessary to overcome presumption, and proximate cause, should be given.

5. Municipal corporations 🔑**706(7)**

In pedestrian's action for injuries received when struck by bicycle while crossing intersection, whether there was violation of traffic ordinance by plaintiff, whether such violation was excusable or justifiable, and whether it contributed proximately to injury, *held* for jury.

6. Municipal corporations 🔑**706(8)**

In pedestrian's action for injuries received when struck by bicycle while crossing intersection, refusal of instruction relating to last clear chance doctrine which omitted element that defendant by exercise of ordinary care had last clear chance to avoid accident, and that he failed to exercise such ordinary care, *held* not error.

7. Municipal corporations 🔑**705(1)**

Right to proceed at intersection at direction of traffic officer authorized by ordinance to direct traffic is conditioned upon continued exercise of due care, which is paramount to duty of obeying signal.

8. Trial 🔑**253(4)**

In pedestrian's action for injuries received when struck by defendant's bicycle at intersection, instruction that defendant had absolute right of way if given traffic signal by officer to proceed over intersection *held* erroneous as omitting reference to defendant's duty to proceed with due care, notwithstanding officer's signal.

9. Trial 🔑**296(3)**

In pedestrian's action for injuries received when struck by bicycle in intersection, error in formula instruction relating to defendant's right of way after signal by traffic officer, arising from omission of reference to defendant's duty to proceed with due care, or plaintiff's opportunity to yield right of way, *held* not cured by general instruction relating to duty to drive vehicle in public highway at prudent speed.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Mrs. C. H. Coffey against Robert Slingerland and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Hearing denied by Supreme Court; CONREY, J., dissenting.

Arthur R. Hemm and Arthur E. Briggs, both of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiff, a pedestrian, injured in a collision with a bicycle propelled by defendant Slingerland (at the time in the employ of defendant Winder), appeals from a judgment entered in favor of defendants after a jury trial. Reversal is sought solely for alleged errors in instructions to the jury.

The accident occurred at the intersection of Seventh street and Broadway, Los Angeles. Plaintiff was crossing Broadway in a pedestrian zone; the bicyclist was riding south on Broadway. There was a conflict of testimony as to whether plaintiff started across Broadway at the first sounding of the bell for the change of traffic, or whether, as she testified, she waited for the second bell and the "Go" signal. Responding to this evidentiary conflict, the court gave instructions as to the effect to be given to a violation of the Los Angeles city ordinance which by its terms forbids any person to enter an intersection until a green or "Go" signal is given. By one instruction the jurors were told that a violation of the traffic ordinance constitutes negligence, and that if such violation thereof proximately contributed in any respect to plaintiff's injury she could not recover. Another instruction, requested by plaintiff, states that if the jury finds that plaintiff started across the intersection before the second bell of the traffic control signal rang, "then it is your duty to decide whether or not the plaintiff was negligent in so doing, and if you find from the evidence that the plaintiff exercised in crossing the said intersection the degree of care which a reasonably prudent person would have exercised in the same circumstances, then you must find the plaintiff not guilty of contributory negligence, notwithstanding your finding that plaintiff left the curb before the second bell sounded." These two instructions as given were to some extent contradictory, and the instruction requested by appellant was more favorable to her than the circumstances in the case justified.

[1-5] In such cases as this the law in California is settled that violation of an ordinance or statute is negligence per se (Kellner v. Witte, 133 Cal. App. 231, 23 P. (2d) 1045), the presumption of negligence arising from failure to perform a duty imposed by law (Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109); but this presumption is not conclusive and may be overcome by evidence that such failure was excusable or justifiable (Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675), and to bar recovery it must of course be found that the negligence proximately contributed to the injury (Morgan v. Los Angeles Rock & Gravel Corporation, 105 Cal. App. 224, 287 P. 152). The instruction relating to this phase of the case should enunciate these principles, leaving it to the jury to determine from all the evidence whether or not there was a violation of the traffic ordinance, whether such violation was excusable or justifiable, and whether it contributed proximately to the injury.

[6] Appellant also complains that the facts entitled her to an instruction upon the doctrine of last clear chance. Without recounting the evidence in detail we agree with this contention, although appellant cannot complain that the instruction offered by her was refused by the court. Such requested instruction omitted as one of the essential constituents of the doctrine the vital element that the defendant by the exercise of ordinary care had the last clear chance to avoid the accident and that he failed to exercise such ordinary care. Darling v. Pacific Electric R. Co., 197 Cal. 702, 242 P. 703.

[7-9] Vitally affecting appellant's rights is the third point made with reference to instructions. As part of the evidence in the case defendant Slingerland testified that he moved across the intersection at the beckoning direction of the traffic officer on duty, who, produced as a witness, also testified that he had given the bicyclist a signal to cross. The traffic ordinance governing in the case provides that traffic officers shall by voice, hand or other signal direct all traffic, "and it shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or other lawful direction of a police officer." Reciting these provisions of the traffic ordinance, the instruction to which appellant objects continued to charge the jury that if they found a traffic officer was on duty at the time and place of the accident and that he gave defendant Slingerland directions to proceed over the intersection, "then you are instructed that defendant Slingerland had the absolute right to continue across said intersection, and it was the duty of all persons, * * * including plaintiff herein, to yield the right-of-way to defendant Slingerland; and if plaintiff failed and neglected to do so, and such failure and neglect contributed directly or proximately to the injuries she sustained, then she is not entitled to recover herein. * * *" The bald, unqualified statement that one receiving a direction or signal from a traffic officer authorized by ordinance so to give traffic directions thereby has an absolute right to cross an intersection, irrespective of the movement of other traffic, is not a correct statement of the law. This right to proceed at the direction of a traffic officer is always conditioned upon the continued exercise of due care by the person obeying such direction, so that the rights of other persons in the same intersection may be properly safeguarded. Such direction of a traffic officer is not to be complied with if compliance would probably result in an accident. Under all circumstances, due care must be exercised, and such exercise of due care is paramount to the duty of obeying the traffic officer's signal. North State, etc., Co. v. Charleston Co., 115 S. C. 267, 105 S. E. 406. Furthermore, the plaintiff under the circumstances would be entitled to a reasonable opportunity to yield the right of way. The instruction omits this element of reasonable opportunity on her part. It also omits the element of notice to or knowledge on the part of plaintiff

of the special order or signal which the officer "gave the defendant." Nor is this instruction cured by the general instruction elsewhere given by the court respecting the duty of a person driving a vehicle in a public highway to drive the same at a careful and prudent speed. The instruction complained of is in the nature of a "formula" instruction, and, as such, is inherently vicious in its present form because it does not contain all the elements essential to a verdict. Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 647

PEOPLE v. HEAD et al.

Cr. 2761.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

1. Conspiracy 🔑28

Conspiracy to commit crimes of burglary and grand theft constitutes an offense.

2. Conspiracy 🔑47

Evidence in prosecution for conspiracy to commit crimes of burglary and grand theft *held* sufficient to establish conspiracy.

3. Conspiracy 🔑37

Prosecution for conspiracy to commit crimes of burglary and grand theft *held* not precluded because commission of such crimes was completed.

4. Conspiracy 🔑47

In prosecution for conspiracy to commit burglary and grand theft, defendant's intent in entering church to commit crime could be inferred from evidence that defendant picked up purse of person in front of defendant when owner was kneeling in prayer, as against contention that there could be no burglary because church was open to public.

5. Criminal law 🔑24

Person is presumed to intend to do things which he does, and especially so when they are done in commission of a crime, excepting where intent must be proved as necessary element.

6. Burglary 🔑41(3)

Entry into building for purpose of committing crime can be proved by acts, conduct, and circumstances connected with offense charged.

7. Criminal law 🔑641(1)

Denying oral motion for substitution of attorneys for defendant *held* not reversible error, where defendant was represented by counsel at all stages of proceeding up to time of hearing on application for probation and pronouncement of judgment and sentence, in absence of showing that defendant suffered any injury because of denial of motion.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Harold Head and another were prosecuted for an offense, and named defendant was convicted of conspiracy to commit burglary and grand theft, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, Justice.

[1] The first point raised by appellant, that "there is no such offense as conspiracy to commit the Crimes of Burglary and Grand Theft," is fully answered by the decision in the case of People v. Welch, 89 Cal. App. 18, 264 P. 324.

[2] The second point, that "the proof is insufficient to establish conspiracy," is fully met by the evidence from which the court could draw no other conclusion than that the defendants went together into at least two different churches, and that almost the same thing happened in each of three instances. In the light of all the evidence before the court, the only reasonable conclusion that could be drawn was that the two defendants planned to do the things they did do before entering the two different churches.

[3] The third point is that "the offense of conspiracy, if committed, was merged with the completed offense. Accused could not be convicted of both the offense and the conspiracy which ended in the offense." This question is answered by

the decision in the case of People v. Eiseman, 78 Cal. App. 223, 250, 248 P. 716.

[4-6] Point 4 is stated by appellant as follows: "The offense of burglary was not committed. (A) There was no proof of any intent. (B) One who enters a church where the public is invited and after services attempts to commit larceny from the person of another invited guest is not guilty of burglary." The facts in evidence were similar in each offense charged, i. e., the picking up of a purse of the person in front of defendants, when the owner of the purse was kneeling in prayer. These facts and the conduct of defendants, as shown, taken as a whole, fully answer subdivisions (A) and (B) of this contention. A person is presumed to intend to do the things which he does, and especially so when they are done in the commission of a crime, excepting where intent must be proved as a necessary element. The public is invited by a church for the purpose of participating in the services, but it certainly cannot be contended that the public is invited there to commit a crime. The entry into a building for the purpose of committing a crime can be proved by the acts, conduct, and circumstances connected with the offense charged. The evidence is almost conclusive that the entry was made into the church in each instance for the purpose of committing the crime of theft.

[7] The fifth point made by appellant is that "the judgment is void because the defendant was denied his constitutional right to be represented by counsel of his choice." The argument in support of this contention, if fundamentally sound, would mean that at least every five minutes during the trial of a case a defendant could change his counsel. Counsel for appellant probably did not mean exactly what was said, but that is exactly what the argument amounts to. The right to change counsel at any time is a right that is to be reasonably exercised, and there is nothing in the record before us which shows any prejudice to the appellant by the refusal of the court to allow a substitution of attorneys, especially in view of the fact that no reason whatsoever for such substitution is stated in this appeal. The record shows that the appellant was represented by counsel at all stages of the proceeding against him up to the time of the hearing on his application for probation and pronouncement of judgment and sentence. Appellant makes no complaint with reference to a denial of his application for probation or pronouncement of sentence, and he has shown nothing in his brief by which it could be imagined that he had suffered any injury by reason of the refusal of the trial judge to grant the oral motion for substitution of attorneys made by counsel for appellant. Ex parte Clarke, 62 Cal. 490.

A careful scanning of the brief record before us shows no error whatever. As the evidence introduced was amply sufficient to support the judgment, the judgment is affirmed.

I concur: HOUSER, P. J.

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9 Cal.App.2d 631

CARVER v. DONIN et al.

Civ. 9694.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

Hearing Denied by Supreme Court Dec. 30, 1935.

1. Automobiles 🔑213

Where part of highway was impassable and barricaded and there was not sufficient highway on right-hand side to allow passage, action of motorcyclist in passing barricade on left-hand side where he was at time of collision with automobile *held* not negligence per se (St. 1931, p. 2124, § 122 (a).

2. Automobiles 🔑245(16, 82)

Where motorcyclist collided with automobile when motorcyclist was passing on left-hand side of barricade in road and evidence warranted finding that motorist had been drinking, did not see lights on approaching motorcycle until warned by guest when motorcycle was few feet away, and skid marks on pavement showed defendant's automobile skidded 45 feet at time of collision, negligence and contributory negligence *held* for trier of fact (St. 1931, p. 2124, § 122 (a).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Grant Carver against Abe Donin and another. From a judgment for the plaintiff, the named defendant appeals.

Judgment modified, and affirmed as modified.

See, also, 139 Cal. App. 395, 33 P.(2d) 841.

Syril S. Tipton and Elmer E. Sawyer, both of Los Angeles, for appellant.

Charles L. Nichols, Carleton B. Wood, and Kidd, Scheh & Delamer, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by defendant Abe Donin, operator of an automobile, from a judgment in plaintiff's favor resulting from a motor vehicle collision on a highway.

The evidence in the case was such as to justify the trial court in finding the following facts to be established: That plaintiff, a member of the state highway motor patrol, was riding his official motorcycle northerly upon a highway between the cities of Long Beach and Los Angeles escorting an automobile, in which professional men were riding to Los Angeles to obtain surgical supplies for use among persons who that evening had been injured by reason of an earthquake shock. The time was after dark and a red and a white light were burning on the motorcycle and the siren was being sounded. The speed was not over 35 miles per hour. Plaintiff swerved his motorcycle to the left or westerly side of the highway, in order to go around a barricade that had been erected around a crack across the easterly twenty feet of the pavement that had been caused by the earthquake. This barricade, consisting of barrels and boxes, and lighted with four red lanterns, extended from the center of the pavement to its easterly edge. Plaintiff's motorcycle was struck head-on by defendant's automobile traveling south, a coupé with four persons in a single seat. The highway was wide and defendant driver had ample room to his right, but instead of driving toward the outer or west edge of the highway, he approached along the middle thereof and, according to some of the testimony, he swerved his car to the left or toward plaintiff's motorcycle immediately before the collision. There were patches of fog along the highway, but at the point of collision there was visibility variously estimated at from 200 feet to half a mile. Plaintiff's injuries were such that he retained no recollection of the circumstances of the accident.

[1, 2] There was testimony to the effect that defendant driver had been drinking. By his own admission, he did not see the lights of the approaching motorcycle until warned of its approach by one of his passengers, when the motorcycle was within 10 or 15 feet of him. The pavement showed skid marks of defendant's car for a distance of 45 feet, and there was testimony to the effect that plaintiff's motorcycle was thrown back some 18 feet by the impact. There was also sufficient evidence that the barricaded portion of the highway was out of repair and impassable, and it does not appear that there was sufficient highway on the easterly side thereof to allow passage of vehicles. Under these circumstances, plaintiff's passing the barricade on the left-hand side thereof would not be negligence per se. California Vehicle Act, § 122 (a) (St. 1923, p. 557, as amended by St. 1931, p. 2124); Buzby v. Lewis, 103 Cal. App. 124, 283 P. 958; Anderson v. Dahl, 121 Cal. App. 198, 8 P. (2d) 883. The court might well have believed from this evidence that defendant driver was negligent in failing to observe the headlights of the motorcycle before he came directly upon it. If, as he claimed, the fog prevented his observing the lights at a greater distance, this fact, together with testimony as to the skid marks and the force of the impact, furnished evidence that he was driving at a negligent rate of speed under the circumstances. Giving full consideration to the earnest argument of appellant, and without reference to other evidence tending to support the findings, we find nothing in this brief statement of facts that would justify this court in saying that, as a matter of law, defendant driver was not guilty of negligence, or that plaintiff was guilty of contributory negligence. The judgment, therefore, should not be reversed.

The judgment was in favor of plaintiff and against defendant Donin, operator of the car, in the sum of $7,653.95, and against defendant owner, Cora Cirino, in the sum of $5,000. Because of the claimed uncertainty as to the rights of the judgment debtors as between themselves under this form of judgment, which we think is more fancied than real, but principally because respondent stipulates to the modification of the judgment, said judgment is modified to read as follows: "That the plaintiff Grant Carver do have and recover of and from the defendant Abe Donin the sum of $2,653.95, and that said plaintiff do have and recover of and from the defendants Abe Donin and Cora Cirino jointly the further sum of $5,000.00 together with his costs which are hereby taxed in the sum of $69.75."

The judgment is affirmed as modified.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 634

CARVER v. DONIN et al.

Civ. 9695.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

Hearing Denied by Supreme Court Dec. 30, 1935.

Automobiles 🔑234

In action to enforce automobile owner's liability for collision which occurred while another was operating automobile with consent of party who borrowed automobile from owner, borrower *held* not necessary party defendant (Civ. Code, § 1714¼).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Grant Carver against Abe Donin and Cora Cirino. From a judgment for the plaintiff, defendant Cora Cirino appeals.

Judgment modified, and affirmed as modified.

See, also, 139 Cal. App. 395, 33 P.(2d) 841.

A. G. Ritter, of Los Angeles, for appellant.

Charles L. Nichols, Carleton B. Wood, and Kidd, Schell & Delamer, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

This is an appeal by defendant Cora Cirino, owner of an automobile whose liability under the judgment for damages rendered against her was founded on section 1714¼, Civil Code.

The facts are the same as stated in the opinion in Carver v. Donin (Cal. App.) 50 P.(2d) 833, this day decided. The points raised on appeal, with a single exception, are decided in that case. The additional point is raised by the following question: "Under section 1714¼, Civil Code, is the borrower, as well as the operator of the owner's automobile, a necessary, as well as a proper, party defendant to render the owner liable for the owner's statutory liability?" The answer to this question is that the borrower, unless he be the operator, is not a necessary party, because, upon these facts alone, he is under no liability. The evidence shows, without conflict, that defendant Cirino loaned her automobile to her brother, who allowed defendant Donin to drive it. The brother who borrowed the car was not operating it at the time of the accident.

The judgment in this case is in the same form as that in the case of Carver v. Donin, this day decided, and for the reasons stated in that case, it is modified so as to read as follows: "That the plaintiff Grant Carver do have and recover of and from the defendant Abe Donin the sum of $2,653.95, and that said plaintiff do have and recover of and from the defendants Abe Donin and Cora Cirino jointly the further sum of $5,000.00, together with his costs which are hereby taxed in the sum of $69.75."

The judgment is affirmed as modified.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 618

MORTGAGE GUARANTEE CO. v. SMITH et ux.

Civ. 9786.

District Court of Appeal, First District, Division 2, California.

Nov. 1, 1935.

Hearing Denied by Supreme Court Dec. 30, 1935.

1. Forcible entry and detainer 🔑6(2)

In suit in unlawful detainer to recover premises sold under power in trust deed, validity of plaintiff's title, when controverted, must be tried as necessary element of remedy (Code Civ. Proc. § 1161a, subd. 3).

2. Appeal and error 🔑907(3)

On appeal taken upon judgment roll alone, appellants must show error, and reviewing court must assume that evidence supported trial court's finding.

3. Mortgages ⚷330

Sale under deed of trust executed prior to enactment of statute limiting place of sale *held* valid, though made in county other than that in which property was located (Code Civ. Proc. § 694).

4. Mortgages ⚷374

Failure to make conveyance to successful bidder at sale under deed of trust did not render invalid title of bidder's assignee, where trustee at bidder's request executed deed to bidder's assignee.

5. Appeal and error ⚷704(2)

Error of trial court in failing to find upon special defenses cannot be presumed, in absence of record showing that some evidence was offered in support of defenses, but reviewing court must assume that findings thereon, if made, would have supported judgment.

6. Appeal and error ⚷1040(10)

Overruling of demurrer will not support reversal of judgment, in absence of showing that defendant was prejudiced, where defendant answered and went to trial on merits.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by the Mortgage Guarantee Company against J. L. Smith and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. L. Smith and J. L. Schiller, both of San Francisco, for appellants.

Oliver Dibble, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in unlawful detainer and had judgment for restitution of the premises and for accrued rents. The defendants admit everything essential to plaintiff's recovery except the validity of its title. They have appealed on the judgment roll alone, and hence we have a record consisting of the pleadings, the findings, and the judgment.

[1] Preliminarily, the appellants argue that the action is not in unlawful detainer but is one to try title. The question is not a new one. In Nineteenth Realty Co. v. Diggs, 134 Cal. App. 278, 288, 25 P.(2d) 522, and Hewitt v. Justice's Court, 131 Cal. App. 439, 443, 21 P.(2d) 641, we held that, in actions brought under section 1161a of the Code of Civil Procedure, the question of title must be tried when controverted as a necessary element of the remedy of unlawful detainer. Here the respondents are suing under the authority of the third subdivision of the section, "Where the property has been duly sold * * * under a power of sale contained in a deed of trust"; appellants answered, attacking the validity of the sale; hence the case comes squarely within the rule cited.

[2, 3] Appellants first attack the sale because it was consummated in Los Angeles county, whereas the property was located in San Mateo county. The respondent replies that a sale outside the county of San Mateo was permitted by the deed of trust. This instrument is not in the record, but it must have been in evidence before the trial court. Since the duty is on appellants to show error, we must assume that the evidence supported the trial court's findings covering the validity of the sale. This must be so unless the statutes limit the rights of the parties to agree as to the place of sale. Section 694 of the Code of Civil Procedure, as amended in 1931, provides that all sales under a deed of trust "hereafter executed" must be held in the county where the property is situated. But the deed of trust involved here was executed before the amendment, and is therefore not controlled by it. No authorities are cited holding that, before the amendment, sales should be made only in the county where the property is situated, and we have not found any. To the contrary, authorities are abundant holding that the sale may be held at any suitable place within the discretion of the trustee in the absence of a statute to the contrary. 41 C. J. p. 967; 3 Jones on Mortgages (8th Ed.) § 2386. It should be noted that the findings disclosed that all the requirements as to notice and as to all other steps leading to the sale were complied with. No fraud or other injury to appellants appears from the record, and we must assume that the sale was fair and without injury to any interested party.

[4] The appellants next argue that respondent's title is invalid because no conveyance in writing was made to the successful bidder at the sale. The record does not support the statement of the fact. The highest bidder was the Metropolitan Life Insurance Company. The property was sold to this company on December 30,

1932. On the following day it sold and assigned all its interest to the respondent. Some time thereafter the trustee executed its deed to the respondent upon the request of the assignor. It is immaterial whether respondent claims under the instrument of December 31 or under the subsequent trustee's deed; it has acquired all the title which the trustee had to convey. The trial court found that on the day stated the property was sold to the highest bidder. If the sale was not accompanied by an instrument in writing, the appellants should have given us a record showing that. If we are to understand appellants' argument to be that the successful bidder may not assign his interest in the property and direct the trustee to convey to the assignee, the authorities are all to the contrary. 41 C. J. p. 993; 3 Jones on Mortgages (8th Ed.) § 2438.

[5] Appellants argue that the trial court committed error in failing to find upon certain issues raised as special defenses pleaded in their answer. In each instance the burden of proof was on the appellants, and error cannot be presumed from the mere statement of it, in the absence of a record showing that some evidence was offered. Since the findings made support the judgment, we must assume upon this record that, if findings had been made upon these issues, they would have been adverse to the appellants. 24 Cal. Jur. p. 944 et seq.

To the suggestion in appellants' brief that the sale was unfair and a fraud upon them, it is sufficient answer that they have not shown either.

[6] Appellants interposed a demurrer to the complaint, both general and special. The general grounds have heretofore been considered; the special grounds need not be stated. When a defendant does not stand on his demurrer, but elects to answer and go to trial on the merits, the overruling of his demurrer will not support a reversal of the judgment unless the defendant shows he was prejudiced by the order. 2 Cal. Jur. p. 1012 et seq.; Nittler v. Cont. Cas. Co., 94 Cal. App. 498, 506, 271 P. 555, 272 P. 309; Harris v. Seidell, 1 Cal. App. (2d) 410, 414, 36 P.(2d) 1104.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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9 Cal.App.2d 719

McCUNE v. HARRIS et al.

Civ. 10473.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1935.

Rehearing Denied Dec. 3, 1935.

1. **Reformation of instruments** 🔑37

In action on note to recover deficiency remaining after sale of collateral, cross-complaint, seeking reformation on ground that note through mutual mistake failed to embody agreement that makers should not be liable for deficiency, *held* to state good cause of action relating to same "transactions" (Civ. Code, § 3399).

2. **Pleading** 🔑225(2)

Where cross-complaint stated good cause of action relating to same transactions involved in complaint, trial court on sustaining special demurrer thereto for want of particularity should have given leave to amend.

3. **Pledges** 🔑30(4)

Elimination from printed note form of provision requiring makers to pay deficiency after sale of collateral *held* not to release makers from liability for deficiency, in view of agreement in note to pay entire amount and interest and attorney's fees, and promise to deposit additional security if demanded.

4. **Courts** 🔑122

Complaint *held* not demurrable on jurisdictional grounds for failure to make specific statement of sums sued for, where, by any computation as to elements comprising total, amount prayed exceeded superior court's jurisdictional minimum.

◆

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by John S. McCune against W. O. Harris and others, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

John J. Ford, Frank M. Benedict, and Ford, Benedict & Ford, all of Los Angeles, for appellants.

Halverson & Halverson, of Los Angeles, for respondent.

GOULD, Justice pro tem.

This action, arises out of a promissory note in the principal sum of $2,300, executed by the eight defendants herein in favor of plaintiff. Collateral was pledged as security for the payment of the obligation, and the note contained appropriate recitals regarding the sale of such collateral in case of default, together with the application of the proceeds, except for the following significant alteration in the printed form of the note: The clauses "returning the overplus to the undersigned. And the undersigned agrees to pay the holder hereof any deficiency upon demand" were crossed out by means of a typewriter and there were added to the original printed form the words "any overplus to be retained by John S. McCune, or assigns." The complaint recited that there had been default in the payment of the note and that the collateral had been sold for $510, which sum had been duly applied upon the obligation, leaving a balance of $1,857.05 principal, together with $230 attorney's fees and interest due, owing and unpaid.

Defendants' demurrer upon the ground of uncertainty, ambiguity, and unintelligibility, in that it could not be ascertained as to what items the sum of $510 was applied, was overruled. Defendants then answered and also filed a lengthy cross-complaint in three causes of action, alleging, in substance, that the note sued upon imperfectly expressed the agreement of the parties and that there was a mutual mistake of all the parties, in that the note did not embody the entire agreement of the signatories, which was alleged in effect to be that under no circumstances was the payee or holder of said note ever to be entitled to any deficiency against the makers after the sale of the collateral. Prayer of the cross-complaint was for reformation of the contract to show this alleged true intent of the parties. Demurrer to the cross-complaint was sustained without leave to amend. Trial therefore proceeded upon the promissory note alone and without reference to the plea for reformation, and the trial court gave judgment for plaintiff and against all defendants. Appeal is made upon a double basis: First, that the court erred in sustaining the demurrer to the cross-complaint without leave to amend; and, second, that judgment should in any event have been for defendants.

[1, 2] In our opinion the court erred in sustaining the demurrer to the cross-complaint without leave to amend. The demurrer was both general and special. It was attempted by cross-complaint to tie up the promissory note herein with a complicated deal between the parties, part of the same general negotiation, and it was claimed that had their true intent been properly expressed the contract under review here would have explicitly provided that the makers of the note were not to be held liable for any deficiency whatsoever. Civil Code, § 3399, provides for revision of contracts under limited situations therein set forth, and we are of the opinion that, measured by the standards set out in California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297, the cross-complaint herein properly set forth a good cause of action relating to the same "transactions" and correctly pleaded facts to invoke equitable cognizance. This being true, the cross-complaint was good against general demurrer, and it was an abuse of discretion under the circumstances of this case to sustain the demurrer without leave to amend, even if there was merit in the special demurrer. Zimmer Const. Co. v. White (Cal. App.) 47 P.(2d) 1087; Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 P. 1025, 67 P. 759; 21 Cal. Jur. 120, notes 5 and 6, and cases cited. As to the special demurrer, we feel that the cross-complaint might well state with more particularity the details of the transaction of the parties and the mistake claimed as a basis for reformation of the contract. The proper ruling on demurrer in our opinion would have been to sustain the same with permission given to cross-complainants to amend.

[3] While the case must be returned for further proceedings in compliance with the foregoing, it is proper also that appellants' second point be considered and ruled upon, for the reason that such ruling would become pertinent if upon a retrial reformation were denied. Appellants claim that the action of the parties in eliminating from the printed note form the words "and the undersigned agrees to pay the holder hereof any deficiency upon demand" is tantamount to the insertion in the note of a provision that the signers would not be required to pay any deficiency; that the act of crossing out the deficiency clause of itself relieves defendants of any deficiency obligation. To hold that the erasure in the instant case ended the liability for deficiency would necessitate giving no effect whatsoever to many of the other clauses of the note, including the promise to pay the entire amount, the promise to pay interest, the promise to pay

attorney's fees, if placed with an attorney for collection, the promise to deposit additional security if demanded, and numerous other solemn covenants. These positive obligations cannot be ignored, and we think the court at the trial, in construing the terms of the promissory note as presented, correctly held that appellants were liable for the deficiency under the terms of the instrument as it then stood. Of course, if reformation of the note is allowed, upon a retrial this same point may not be presented.

[4] Appellants also object that their demurrer to the original complaint for uncertainty was overruled, arguing that the court is entitled to a more specific statement of the sums making up the total of $2,087.05 sued for, to determine whether or not it had jurisdiction to entertain the action. The demurrer was properly overruled. By any computation as to the elements comprising the total, the amount prayed for was in excess of the superior court's jurisdictional minimum. The ad damnum clause test as to jurisdiction (Sturgeon v. Security First Nat. Bank, 139 Cal. App. 197, 33 P.(2d) 874) is also fully met.

The judgment is reversed, with directions to the court below to sustain the demurrer to the cross-complaint, with leave granted to cross-complainants to amend.

We concur: CRAIL, P. J.; WOOD, J.

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9 Cal.App.2d 650

In re DODGE'S ESTATE.

DODGE v. DUFFY et al.

Civ. 10212.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

1. Courts 🔑200½

Probate court has no jurisdiction to try title to estate, where stranger claims property adverse to estate, which will be diminished if stranger prevails, under statute authorizing probate court to determine who is entitled to distribution of estate (Probate Code, § 1080).

2. Courts 🔑200½

Jurisdiction of probate court is limited to ascertainment and determination of interests claimed in privity with estates, and does not extend to rights claimed adversely.

3. Courts 🔑200½

Probate court had jurisdiction to determine who were entitled to distribution of estate of testator, where all parties whose rights were determined claimed under will and admitted that property in controversy was part of estate, and where court could have made no finding under issues presented by petition which would have changed assets of estate (Probate Code, § 1080).

4. Wills 🔑439

In construing will, court must carry out intention of testator.

5. Wills 🔑759(1)

Provision of will giving wife one-third interest in residue of testator's estate only in case she survived order of distribution *held* not to limit other bequests to wife or provision that written obligations of beneficiary of will should be treated as advancement, where wife was obligated to estate at time of her death before distribution.

6. Wills 🔑759(1)

Where testator intended obligations owed him by his wife, who was beneficiary under will, to be treated as advancement, his executor could not require payment of such obligations from wife's estate, where testator's estate was sufficient to pay debts and expenses of administration (Probate Code, § 1050).

◆

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceeding in the matter of the estate of Albert Dodge, deceased, wherein John B. Dodge petitioned for construction of the will of Albert Dodge, deceased, contested by Milton Duffy and another. From an adverse judgment, petitioner appeals.

Affirmed.

A. L. Rowland and Morm, Newell, Brown & Hamill, all of Pasadena, for appellant.

H. G. Simpson, Leon U. Everhart, and Leonard L. Riccardi, all of Pasadena, for respondents.

EDMONDS, Justice pro tem.

Albert Dodge died testate leaving his wife, Myrtle Colton Dodge, and three children by a former wife surviving him. Mrs. Dodge died before distribution of his estate, and the present proceeding was brought to determine whether or not money loaned by Mr. Dodge to his wife after the execution of his will constitutes an advancement under the terms thereof. The right of her estate to certain personal property mentioned in the will is also in dispute.

John B. Dodge, a son of Albert Dodge and a beneficiary under his will, petitioned the superior court in the probate proceedings to "construe the will of said Albert Dodge, deceased, and determine the true intent and meaning of said will and of all the terms and provisions thereof, and by order and decree declare who are his heirs and who are entitled to the distribution of his estate when such estate shall be ready for distribution, * * * and that said court further find, order, adjudge and decree that said Albert Dodge did not by his said will or otherwise make any advancement of any kind or nature to said Myrtle Colton Dodge, and * * * that said court determine, order, adjudge and decree that the estate of Myrtle Colton Dodge, deceased, has no right claim or interest in any of the property belonging to the estate of said Albert Dodge, deceased * * *." The court rendered its judgment that Mr. Dodge made an advancement to his wife and that her estate is entitled to take the household furniture and the automobile bequeathed to her under the will. From this judgment petitioner appeals on the two points that the superior court had no jurisdiction to entertain his petition and determine the questions presented thereby, and that the judgment is not in accordance with the terms of the will.

By his will executed in April, 1929, Mr. Dodge gave to his wife all of the household furniture and an automobile. He then made certain specific bequests, and devised and bequeathed one-fourth of the remainder of his estate in trust for his daughter. The testator then provided as item VIII: "All the rest, residue and remainder of my property and estate of every kind and nature whatsoever, I give, devise and bequeath in equal shares to my beloved wife, Myrtle Colton Dodge, and to my beloved sons, John B. Dodge and Howard Dodge, share and share alike, provided my said wife shall survive until the Executor of my Estate shall have been directed by the Order of the Court to distribute my estate under the provisions of my Will. If my said wife shall not survive until such order of distribution, then eight-ninths (8/9), of all the rest, residue and remainder of my property and estate hereinbefore mentioned in this Item VIII, of my Will, shall be divided equally between my two sons, John B. Dodge and Howard Dodge, and the remaining one-ninth (1/9), of said rest, residue and remainder of my property and estate shall be assigned, transferred and set over to the Trustees hereinbefore mentioned in Item VII of this my Will * * *."

Following this bequest to his wife, and as a part of item VIII, the testator states: "In explanation of the provisions of this Item of my Will, which in effect require that unless my said wife, Myrtle Colton Dodge, shall live until an order of the Court shall be made distributing the property and estate disposed of by this Item VIII of my Will, no part of such property or estate shall benefit her estate, I desire to state the following reasons: * * * All the property comprising my estate is either property owned by me at the time of my marriage to my said wife, Myrtle Colton Dodge, or consists of the accumulations from the investments of such property, and in no sense is any of the same Community Property. Accordingly, by sound principles of equity and justice, if my beloved wife shall die prior to the time an order of Court shall be made distributing that portion of said property disposed of in this Item of my Will, such property should benefit only my own three children, or their heirs; said three children being the children of my former wife, who died between one and two years prior to my marriage to my beloved wife, Myrtle Colton Dodge, and all of said three children having been married with homes of their own before my marriage with the said Myrtle Colton Dodge."

The next subject in the will is the one which occasions most of the present controversy. It reads: "It is my desire and I hereby direct that if at the time of my death, I shall hold the written obligation for the payment of money to me of any beneficiary under this my Will, whether such obligation be payable before, or after my death, such obligation, together with accrued and unpaid interest thereon, shall be treated as an advancement made by me to such beneficiary for the amount of such obligation and unpaid accrued interest, and the same shall be taken into account and be treated as an advancement in the distribution of my estate, regardless of the date of such obligation, or the period of time that has elapsed since the same fell due, if any."

This controversy arises over two notes for $1,000 and $2,500 made by Mrs. Dodge to the order of her husband, each of which is secured by a deed of trust to real estate. The notes evidence money borrowed by Mrs. Dodge from her husband subsequent to the date he made his will. The representatives of Mrs. Dodge claim that by the terms of his will Mr. Dodge made an advancement to his wife of the amounts which she had borrowed.

[1, 2] Concerning the first point presented on appeal, section 1080 of the Probate Code provides: "When the time to file or present claims against the estate has expired, but the estate is not in a condition to be closed, any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim and praying that the court determine who are entitled to distribution of the estate." It is well settled that under this section the superior court sitting in probate has no jurisdiction to try title "where a stranger is claiming property adverse to the estate, and where, if the plaintiff prevails, the property will be taken away from the estate and will no longer be a part thereof." Johnson v. Superior Court, 102 Cal. App. 178, 185, 283 P. 331, 334. It has long been the rule that the jurisdiction given to the probate court is limited "to the ascertainment and determination of rights and interests claimed in privity with the estates, and are not applicable to rights or titles claimed adversely to such estates." In re Burton, 93 Cal. 459, 461, 29 P. 36; In re Estate of King, 199 Cal. 113, 248 P. 519. On the other hand, it has been held in numerous cases that the section provides a special proceeding by which the rights and interests of those claiming in privity with the estate may be determined. Whalen v. Smith, 163 Cal. 360, 125 P. 904, Ann. Cas. 1913E, 1319; In re Estate of Vucinich (Cal. Sup.) 44 P.(2d) 567.

[3] In the case at bar all of the parties whose rights were determined by the judgment claim under the will. The title of Albert Dodge to the notes and personal property was not challenged by any party to the proceeding. The parties admitted that all of the property in controversy is a part of his estate, and that the only question involved is who shall succeed to it. No issue was presented under which the court could have made a finding which would have changed the assets of the estate. Whichever party prevails, the notes and the household furniture will still be a part of the estate of Albert Dodge. The whole purpose of the proceeding is to determine the rights of the respective parties to the property in controversy. The petition of appellant, therefore, presented issues which the superior court sitting in probate had jurisdiction to determine.

[4] In support of the second point raised on the appeal, it is earnestly contended that the findings violate well-established rules for the construction of wills. It is, of course, elementary that the intention of the testator is of paramount authority in the construction of wills, and that a court must carry out such intention. "It is the duty of the court to interpret the provisions of a will and to carry out the intention of the testatrix, if that intention can be ascertained, provided no law is violated in so doing." In re Estate of McCray, 204 Cal. 399, 268 P. 647, 648. But the judgment before us carries out the intention of Albert Dodge, as we read his will.

[5] It is to be noted that by item VIII of the will Mr. Dodge gave his wife a share in the remainder of his estate provided she survived him until its distribution. His explanation concerning the reasons why he made this provision are expressed at considerable length and particularly refer to "the property and estate disposed of by this Item VIII of my Will." Thereafter he states that unless his wife survived him until distribution of his estate "that portion of said property disposed of in this Item of my Will * * * should benefit only my own three children." The language is explicit in limiting the operation of the provision that the wife must live until distribution of the estate to take under the will, to the particular property left to her under item VIII. This portion, it may be observed, is a part of the remainder of the estate after specific bequests have been made, one of which is of the household furniture in controversy here.

True, in a later provision of item VIII, the testator states: "If my beloved wife, Myrtle Colton Dodge, shall die before my estate shall be finally distributed as contemplated by this Item VIII of my Will, she will not need any portion of my estate for her support and comfort." But this paragraph mentions item VIII and is a part of item VIII and must be held to affect only the property provided by Mr. Dodge for his wife in this one item of his will.

[6] For the reasons above stated, the provisions of item VIII do not limit nor control the bequest of the household furniture and the automobile. Neither do such provisions limit or control the following item of the will which provides that the written obligations of any beneficiary of the will shall be treated as an advancement made by the testator to such beneficiary. Petitioner's contention that an advancement can be made only by a parent to a child is not well taken. Section 1050 of the Probate Code concerning advancements does not so limit them. The intention plainly expressed by the testator is that the amount of principal and interest represented by the notes constitutes an advancement to his wife under his will, and being such, his executors cannot require payment of the notes from the estate of the wife, the estate being sufficient to pay all debts and expenses of administration without them.

The judgment, or decree as it should properly have been denominated (section 1082, Probate Code), is affirmed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 663

MILLER v. PARADISE CO., Inc., et al.

Civ. 9433.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

Appeal and error 🔑607(1)

Proceedings for preparation of record on appeal in case wherein two reporters were employed to take down proceedings *held* properly terminated on ground that time for filing of record had expired, where, prior to termination, appellant made no arrangement for preparation of clerk's transcript or of such reporter's transcript as was available, and took no measures after discovery that record of one reporter was not available to supply any bill of exceptions or statement of missing record (Code Civ. Proc. § 953a).

◆

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Harry S. Miller, trading as the Bonded Adjustment Bureau, against Paradise Company, Incorporated, and the Finance & Discount Corporation. From an order terminating proceedings for preparation of record on appeal, second named defendant appeals.

Affirmed.

John E. Dalton, of Los Angeles, for appellant.

Samuel A. Miller and Paul J. Ziegler, both of Los Angeles, for respondent.

YORK, Justice.

Appellant states that the sole question involved in this appeal is: "Did the trial court err in granting a motion for an order to terminate proceedings for preparation of a record on appeal, where it appears that delay in preparing said report is due to the failure of court officials to keep proper record of all proceedings?" Respondent meets this with his statement of the question involved, as follows: "Did the trial court err in granting respondent's motion for an order to terminate proceedings for preparation of a record on appeal, where the time for the preparation and filing of such record had long since passed?"

The facts in the case are that, on the trial of the cause which occurred on two widely separated days, two different reporters were employed to take down the proceedings, for the reason that one of such reporters was available, while the reporter who acted upon the first occasion was not available and could not be located to make up a complete record. Prior to the termination of the proceeding in the trial court, appellant never made the arrangement, as provided in section 953a of the Code of Civil Procedure, for the preparation either by the clerk as to the clerk's transcript, or by the reporter of such reporter's transcript as was available; and took no measures, after his discovery that the record of one reporter was not available, to supply any bill of exceptions or statement of the missing record. An affidavit was filed on behalf of appellant setting forth certain details and reasons therefor, but such affidavit does not show that proper arrangements were made with the reporter, who took down part of the proceedings, to prepare his part of the record at any time, and there is nothing to show that the clerk's record was ever prepared. The clerk's transcript on file in this matter is merely a transcript of the affidavit of John E. Dalton, counsel for appellant; minute order granting motion to terminate proceedings on appeal; notice of appeal; notice of entry of judgment; notice of motion to terminate proceedings with affidavit of service by mail attached; and notice to clerk to prepare transcript. No copies of the pleadings are presented, and there is nothing in the affidavit or record before us to show why a bill of exceptions or a statement of the case could not have been prepared within the time provided by law.

We can see no error committed by the trial court in making the order terminating the proceedings. It was proper for the trial court to make such order, as no diligence whatever was shown as to the preparation of such part of the record as was available to appellant.

The order appealed from is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

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9 Cal.App.2d 679

CANDINI v. HIATT.

Civ. 5326.

District Court of Appeal, Third District, California.

Nov. 1, 1935.

Hearing Denied by Supreme Court Dec. 30, 1935.

1. Automobiles 🔑244(20)

Evidence, in action for injuries sustained by guest, sustained implied finding that driver of automobile, who, after barely escaping accident while driving around curve at rate of 45 miles an hour, disregarded repeated warnings against his excessive speed and attempted to traverse second turn at rate of 50 miles an hour, was guilty of "willful misconduct."

Person who deliberately performs acts which proximately result in injuries complained of either with intention to inflict injuries, or with knowledge and appreciation that his acts are likely to result in injury, is guilty of "willful misconduct."

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles 🔑245(24)

In action for injuries sustained by guest in automobile accident, credibility of witnesses and weight of evidence *held* for jury.

3. Trial 🔑260(8)

In guest's action for injuries sustained in automobile accident, refusal of instruction showing distinction between gross negligence and willful misconduct *held* not error, where such distinction was not an issue, and instruction given defined "ordinary negligence" and "willful misconduct" and instructed that mere proof of ordinary negligence or even gross negligence would not warrant finding that defendant was guilty of willful misconduct.

4. Trial 🔑252(20)

Instruction that amount injured plaintiff would necessarily become obligated to pay for medical services and reasonable value of time of plaintiff during which she was disabled might be considered in assessing damages *held* erroneous, where there was no evidence upon which jury could base estimate of such future expenses or value of loss of time.

5. Appeal and error 🔑1170(9)

Erroneous instruction which permitted jury to consider amount of future medical expenses and value of loss of services in assessing damages, in absence of evidence upon which estimate could be based, *held* not reversible error where judgment rendered was not excessive after elimination of elements erroneously considered (Const. art. 6, § 4½).

6. Damages 🔑132(3)

$12,557 to young woman for fracture of vertebra, permanently affecting spinal cord canal and nervous system, and for lacerations over shoulder, on neck, and under jaw, resulting in impairment of nerve supply, affecting reflex action of limb and knee, and causing loss of 95 per cent. of efficiency of right arm, *held* not excessive.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Zelda Candini against Lloyd Hiatt. Judgment for plaintiff, and defendant appeals.

Affirmed.

James W. Hughes, of Oakland, and Neumiller & Ditz, of Stockton, for appellant.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment for damages which was rendered against him for willful misconduct in the operation of his automobile resulting in injuries sustained by a guest who was riding with him.

It is contended the evidence fails to show that the defendant was guilty of willful misconduct and that the court erred in giving and refusing certain instructions.

[1] There is a conflict of evidence, but we are of the opinion the implied findings and judgment are adequately supported by the record with respect to proof of willful misconduct on the part of the defendant. Neither the seriousness of plaintiff's injuries nor the amount of the judgment is challenged. While some of the circumstances are disputed, the following facts are sufficiently supported by the evidence: On the night of July 23, 1934, the defendant conveyed the plaintiff and her husband and one other passenger in his single-seated Studebaker coupé automobile from Manteca to Valley Springs on a pleasure expedition. The defendant drove his machine. His friend Miss Douglass sat by his side, and Mrs. Candini sat on her husband's lap on the extreme right-hand side of the seat. After arriving at Valley Springs they spent a couple of hours eating and dancing at a resort. The defendant drank a cocktail or two, but exhibited no evidence of intoxication. About one o'clock the following morning they started to drive back to Manteca. They were seated in the automobile in the same manner above described. It was dark. The lights and brakes of the machine were in good order. There was no mechanical defect in the car. The defendant drove along the paved highway at the rate of forty-five miles an hour. He was not familiar with the roadway, never having driven over it except on their journey to the springs that night. As they approached the first abrupt turn in the highway about one-half mile from Valley Springs, Mr. and Mrs. Candini, who were well acquainted with the roadway, warned the defendant of the proximity of the sharp curve in the roadway and asked him to reduce the speed of his machine. He paid no attention to their warning, saying at the trial of the case: "I thought I would make it, and I did." There is evidence indicating that he barely escaped an accident at that first turn of the roadway. His machine skidded over on to the outer side of the pavement, but managed to hold its upright position and continue on its course. About a quarter of a mile beyond this first turn, there is another abrupt angle in the highway which was well known to the plaintiff and her husband. When the machine reached a point about halfway between these two sharp turns, both the plaintiff and her husband again warned the defendant that he could not make the turn unless he diminished his rate of speed. Mrs. Candini testified that she was "nearly frightened to death" at the rate of speed they were traveling and at the reckless manner in which the defendant operated the machine. She testified that when the machine was 300 feet from the second turn she said to him: "Slow down, as there is a curve just ahead." The defendant admits hearing her warning. He not only disregarded the request, but he grinned at her and accelerated his speed. The plaintiff testified that she was terrorized at their danger and said to him: "Lloyd, stop and let me out." All of the occupants of the machine agree that both Mr. and Mrs. Candini warned the driver against the dangerous curve in the highway which they were approaching, and that the plaintiff protested against the rapid rate of speed. At the rate of at least fifty miles an hour the defendant attempted to traverse the second turn of the roadway. His machine swerved and skidded off the highway into a ditch on the left-hand side and then careened back across the pavement to the opposite side thereof and overturned. The plaintiff was seriously injured.

The gist of the evidence which supports the implied finding that the accident occurred as a result of the willful misconduct of the defendant is that with four persons crowded into one seat in his machine, and after ample warning and barely escaping an accident while driving around the first curve in the roadway at the rate of forty-five miles an hour, he immediately thereafter disregarded repeated warnings against his excessive speed and the danger of another sharp turn in the roadway just ahead of them, and defiantly grinned and recklessly increased the speed of his machine to fifty miles an hour in utter disregard of the grave danger to his passengers. He must have known and appreciated the great danger of repeating his experience of trying to traverse a sharp curve in the roadway at so high a rate of speed. Yet with reckless disregard of the lives of his passengers, he laughed at their fear and increased the speed of his machine. We are of the opinion this action constitutes willful misconduct on his part.

[2] Some discrepancies in the testimony are pointed out, and it is suggested that it is improbable that the plaintiff would have asked the driver of the machine to stop and let her get out. But all of the witnesses agree regarding the rapid rate of speed at which the machine was driven and that the defendant was warned of the danger of both curves in the roadway and failed to diminish his speed. The defendant himself admitted that he was driving his car forty-six miles an hour when he reached the first turn in the road, that he heard the plaintiff's warning and did not decrease the speed of his machine. Moreover, the credibility of witnesses, and the weight and sufficiency of the evidence are ordinarily matters for the exclusive determination of the jury. Under the circumstances of this case their province in that regard may not be interfered with.

Proof of willful misconduct depends on the facts of each particular case. It may be said, however, that when it appears that a person deliberately performs acts which proximately result in the injuries complained of either with the intention to inflict injuries, or with the knowledge and appreciation that his acts are likely to result in injury, he is guilty of willful misconduct. In the case of Sanford v. Grady, 1 Cal. App. (2d) 365, 371, 36 P.(2d) 652, 655, 37 P.(2d) 475, quoting with approval from the case of Norton v. Puter, 138 Cal. App. 253, 32 P.(2d) 172, the following pertinent language was used with reference to the definition of willful misconduct:

"'Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; Olson v. Gay, 135 Cal. App. 726, 27 P.(2d) 922; Walker v. Bacon, 132 Cal. App. 625, 23 P. (2d) 520; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279. Webster's New International Dictionary, p. 1379, defines misconduct as "wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance." 40 C. J. p. 1221. Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences. In Helme v. Great Western Milling Co., supra, it is said:

"'" 'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' Burns' Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central of Georgia Ry. Co., 165 Ala. 407, 51 So. 792."'"

[3] The refusal of the court to give to the jury defendant's instruction No. 11-A is not erroneous under the circumstances of this case. That offered instruction reads: "While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. Willful misconduct implies at least the intentional doing of something, either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

The jury was clearly instructed that it could render a verdict against the defendant only if they were satisfied that the plaintiff had affirmatively proved by a preponderance of the evidence that the defendant was guilty of willful misconduct which was the proximate cause of the accident resulting in the injuries complained of. The following instruction which was given at the request of the defendant sufficiently covers the essential portion of the rejected charge. It reads: "You are instructed that there is a clear distinction between the two terms, 'negligence' and 'willful misconduct.' 'Negligence' is defined in law as follows: 'Negligence means the want of such care as a person of ordinary prudence would exercise under the same or similar circumstances as proved in the given case.' 'Willful misconduct' means something much more than mere negligence, or even gross negligence, and involves the intentional doing of something with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequence."

In the instruction which was given to the jury "ordinary negligence" was defined, and the jury was told that mere proof of ordinary negligence or even gross negligence would not warrant them in finding the defendant guilty of willful misconduct. Then the term "willful misconduct" was clearly defined. As any person of common intelligence knows, the term "gross negligence" merely means an increased degree of ordinary negligence. Cook v. Cole, 273 Mass. 557, 174 N. E. 271, 273. The distinction between ordinary negligence and gross negligence does not appear to have been an issue in this case. We do not believe the jury could have been deceived by a failure to give a more specific definition of gross negligence. The refusal of the challenged instruction was therefore not erroneous.

[4] Finally, it is contended the court erred in instructing the jury that in assessing damages they might take into consideration "the amount, if any, which the plaintiff, Zelda Candini, has paid or become obligated or will necessarily become obligated to pay on account of the services of physicians, surgeons, nurses, hospital services, medicines and medical supplies," and for "the reasonable value of the time of the plaintiff, Zelda Candini, during which she was disabled, by reason of the injuries," since there is no evidence that she will incur future liability to pay any definite sum on that account.

The last clause of the preceding instruction does not inform the jury they may estimate damages based on future loss of time. It is confined to such loss of time in the past "during which she was disabled." The disability referred to relates only to the past tense.

The jury was further elsewhere instructed that they should allow only such damages as would compensate the plaintiff for the injuries she received, and that it was not proper to award damages based on sympathy or such as would be speculative or remote, and warned them against attempting to measure the damages by trying to determine what sum of money they would be willing to accept for enduring such pain as the plaintiff suffered and such injuries as she sustained.

[5] The preceding quoted excerpts from the challenged instruction are erroneous since there is no evidence upon which the jury could base an estimate of probable necessary future expenses or the value of the loss of plaintiff's household services during her disability. However, we are of the opinion the giving of this instruction is not reversible error, and that, on the contrary, the judgment may be affirmed under the provisions of article 6, section 4½, of the Constitution, since the evidence, without substantial conflict, shows that the plaintiff was very seriously and permanently injured, and it may not be reasonably said the amount of the judgment is excessive if all question of future expense for medical care and the value of her loss of personal services is eliminated.

[6] It satisfactorily appears that the plaintiff was a young woman of the age of twenty-three years and in excellent physical health and condition before the accident occurred. Two physicians testified to practically the same injuries which she received, and to substantially the same result of those injuries. There is no evidence to the contrary. No physician was called in behalf of the defendant. The plaintiff suffered a transverse fracture of the fifth cervical vertebra which has permanently affected her spinal cord canal and the nervous system; there was an eight-inch laceration over the right shoulder; there were other serious lacerations on the neck over the jugular vein and under the jaw which severed the muscles; the nerve supply for the right arm and

shoulder was severed and destroyed or seriously impaired, with the result of a loss of sensation; the injury to the spinal cord has seriously affected the reflex action of her limb and knee; the right arm has lost 95 per cent. of its efficiency; she cannot extend her forearm; she has lost the power to contract the muscles or grip an object with her right hand; she cannot comb her hair or dress herself or use this hand to perform her personal and household duties; the right shoulder is curved; certain severed muscles and tendons cannot be reunited; her physicians advised the plaintiff that another operation is necessary; her physical condition, as a result of her injuries, is extremely serious, painful, and humiliating; several of her major injuries are permanent, as both doctors agree. Under such aggravated circumstances we may not say that a judgment of $12,557 is excessive, even though the elements of actual future necessary expense on that account and the value of loss of her time be entirely eliminated from consideration. For the reason that there appears to have been no miscarriage of justice in this case, we are of the opinion the giving of the erroneous portions of the challenged instruction is not reversible error.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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9 Cal.App.2d 695

BENJAMIN MOORE & CO. v. O'GRADY.

Civ. 5324.

District Court of Appeal, Third District. California.

Nov. 1, 1935.

1. Appeal and error 🔑931(3)

Where findings are waived, appellate court must presume that everything which trial court might have found necessary to sustain judgment was found.

2. Appeal and error 🔑931(1)

Where findings are waived, all reasonable inferences and most favorable construction will be drawn from evidence to support judgment.

3. Bills and notes 🔑452(3)

Since assignee suing maker of note was not "holder in due course," partial failure of consideration *held* defense pro tanto under statute (Civ. Code, § 3109).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words & Phrases.]

4. Bills and notes 🔑530

Where maker, although establishing defense of partial failure of consideration, did not tender sum admittedly due, holder of note *held* entitled under terms thereof to 6 per cent. interest on such sum from date of note until paid.

5. Appeal and error 🔑984(5)

In action on note for $282.32, bearing interest at 6 per cent., where court impliedly found that only $84 was due, allowance of only $15 as attorneys' fees, although somewhat insignificant, would not be disturbed on appeal.

◆

Appeal from Superior Court, Stanislaus county; J. C. Needham, Judge.

Action by Benjamin Moore & Company against George E. O'Grady. From a judgment granting plaintiff partial relief, plaintiff appeals.

Corrected and affirmed.

W. Coburn Cook, of Turlock, for appellant.

Bush & Cleary, of Modesto, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action against the defendant to recover upon two assigned claims or causes of action, the first cause of action being based upon a promissory note dated January 9, 1931, payable on September 1, 1931, in the sum of $282.32, bearing interest at the rate of 6 per cent. per annum, executed by the defendant and delivered to Figatner-Scott Company, the assignor of the plaintiff.

The second cause of action was based upon a book account in the sum of $32.39 for goods, wares, and merchandise alleged to have been purchased by the defendant from the Luyties Pharmacal Company, and assigned to the plaintiff.

The answer of the defendant admitting the execution of the note, set up as a defense thereto a lack of consideration for any sum in excess of $84, and also the further defense that at the time of the execution of the note there were negotiations between the assignor of the plaintiff and the defendant, that the amount due, for which the note was given, would be adjusted in accordance with the actual indebtedness found to exist on the part of the defendant to the plaintiff's assignor, Figatner-Scott Company. The record shows that the defendant had been buying certain supplies from the assignor of the plaintiff to be used on certain buildings which the defendant was having constructed, repaired or painted.

After the execution of the promissory note it was further alleged the defendant examined his accounts and found that his indebtedness to the Figatner-Scott Company was only the sum of $84, which sum the defendant offered to pay the Figatner-Scott Company; that the Figatner-Scott company refused to comply with its agreement to have the note adjusted to evidence the amount which was actually due from the defendant to the Figatner-Scott Company; and that the consideration for which the note had been given had failed in excess of the sum of $84. We have not followed the formal language of the pleadings, but the foregoing are the facts set forth therein.

The court awarded the plaintiff judgment for $84 principal on account of the note which we have mentioned and $15 attorneys' fees; also awarded judgment in the second cause of action in the sum of $17.10. From this judgment the plaintiff appeals.

[1] No question is presented as to the second cause of action. The appellant presents for our consideration matters pertaining only to the first cause of action, insisting that judgment should be awarded for the full face of the promissory note, together with interest thereon from the date of its execution. This contention is based upon the assertion that the testimony does not support the conclusions reached by the trial court. Findings were waived, and therefore we are bound by the presumption that everything which the court might have found necessary to sustain the judgment was found.

On the part of the appellant it is contended that the defendant in this action was represented by one Charles Apitz, acting as his contractor, and as his agent may have contracted bills with the Figatner-Scott Company in the name of the defendant in the sum of $282.32. This argument is based upon the testimony of the defendant, where he uses the following language: "Charles Apitz was my contractor and did work for me over a period of several years. As far as my knowledge goes, Charles Apitz may have ordered materials on my account and used them on buildings other than mine, and the sum of $282.32 may have been the amount on my account as of January 9, 1931, as far as the books of the Figatner-Scott Company show."

Relying on this testimony of the defendant in which he offers as an explanation of how the error may have occurred, it is argued that the defendant is bound thereby and therefore that the testimony does not support the finding and judgment of the court.

[2] Turning to the affidavit of A. F. Figatner, the president of the Figatner-Scott Company, we find the following: "Affiant further says that the defendant had a running account with the Figatner-Scott Company, and was buying goods, wares and merchandise from it for a considerable period before said date, and the note was given for the balance due the Figatner-Scott Company by the defendant, as of the date of said note, and that the Figatner-Scott Company never sold or delivered to Charles Apitz any goods, wares, or merchandise, to affiant's knowledge or belief, which was to be used by me on any property of the defendant's, but that the merchandise, the balance of the purchase price for which the note was executed, was sold and delivered to the defendant at his special instance and request." This, of course, furnished a basis for the court to have found that the Figatner-Scott Company did not sell or deliver any goods, wares, or merchandise, charging the same to the defendant, which may have been ordered by Charles Apitz acting in the capacity of agent of the defendant. In the absence of findings it will be presumed that the court did so find, and that the judgment would be supported by a finding that Apitz did not, in the capactiy of agent for the defendant, order any goods, wares, or merchandise from Figatner-Scott Company. The law is well settled that all reasonable inferences will be drawn from the evidence, and that the most favorable construction will be drawn therefrom to sup-

port the judgment where findings have been waived. We do not need to cite authorities to support this statement.

In relation to the points made by the respondent that the facts show that Figatner-Scott Company promised and agreed with the defendant to change the figures in the note to correspond with the amounts actually due, and that such agreement constituted a part of the consideration, and that failure to comply with the agreement might be urged as a failure of consideration, we need not enter into any extended discussion. The following cases do hold that where an oral agreement enters into and becomes a part of the consideration for a note, a failure to comply therewith is a failure of consideration, to wit: Shipley Co. v. Rosemead Co., 100 Cal. App. 706, 280 P. 1017; Silva v. Gordo, 65 Cal. App. 486, 224 P. 757; North v. Evans, 117 Cal. App. 317, 3 P.(2d) 609; Richardson v. Lamp, 209 Cal. 668, 290 P. 14.

[3, 4] Even though it might be held that the agreement to adjust the figures in the note to correspond with the amount due, not sufficiently shown by the testimony, we think section 3109 of the Civil Code is a complete answer to the contention of the appellant so far as the principal of the note is concerned. That section reads: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise." Thus, the court having impliedly found that only $84 was due on account of wares, goods, and merchandise purchased by the defendant from the Figatner-Scott Company, a failure of consideration between that amount and the face of the note is immediately established. Consequently, under the section of the Civil Code, supra, judgment necessarily would have to go for the plaintiff only in the amount actually due as a pro tanto failure of consideration, is clearly established if the court accepted the testimony of the defendant.

We do not need to discuss any of the other points involved in this case, so far as the principal amount due on the note in question is concerned. However, it further appears from the record that the defendant never tendered to Figatner-Scott Company the $84 admitted by him to be due, and did not make any tender in court of that sum.

It results that the trial court was in error in not allowing interest on the sum of $84 at the rate of 6 per cent. per annum from the date of the note until paid. It further appears from the record that the plaintiff in this action is not a holder in due course, and that therefore a failure of consideration may be urged as against the note held by the plaintiff as assignee.

[5] The contention is also made that the trial court erred in allowing only $15 as attorneys' fees. The trial court being in a better position to determine the amount that should be allowed as attorneys' fees, we do not see any reason for disturbing the allowance, even though the sum does seem to be somewhat insignificant, being only $15.

It follows from what we have said that the judgment of the trial court should be corrected in so far as interest is concerned.

It is therefore ordered that the judgment of the trial court be corrected so as to allow the plaintiff $84 as principal upon the note in question, and interest thereon at the rate of 6 per cent. per annum from the date of the note until paid, and as so corrected, the judgment will stand affirmed as to both causes of action. Costs on appeal are awarded the appellant.

We concur: PULLEN, P. J.; THOMPSON, J.

9 Cal.App.2d 723

GABEL v. MERRALLS.

Civ. 10515.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1935.

1. Bills and notes 🔑143

Maker of note executed contemporaneously with option to purchase real estate from payee which provided for cancellation of note if option agreement was satisfactorily consummated *held* liable on note, where option agreement was not consummated.

2. Bills and notes 🔑92(1)

Agreement between maker and payee of note that maker had option to purchase realty from payee within two years and that if maker obtained purchaser for property he was to receive 75 per cent. of purchase money in excess of amount of note *held* sufficient consideration to support note, especially where note provided that it was given in consideration of option agreement.

◆

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by T. R. Gabel against Charles N. Merralls. From a judgment for plaintiff, defendant appeals.

Affirmed.

Euler & Subith, of Los Angeles, for appellant.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of plaintiff on a promissory note executed by defendant in favor of plaintiff for the sum of $3,740, with interest. Defendant pleaded as special defenses the execution of the contract hereafter referred to, and that there was no consideration passing from plaintiff to him for the note.

On the same day that the promissory note was executed, April 14, 1931, the parties entered into a contract by which plaintiff granted to defendant the option to purchase certain real property for a similar sum. The pertinent parts of said contracts are as follows: "First: First party [plaintiff] hereby grants to the second party [defendant] the first option to purchase said real property for the sum of $3,740.00 plus interest * * * said option to extend and endure for a period of twenty-four months from date hereof. Second: If and in the event during said period of time second party obtains a purchaser for said property, then any and all moneys over and above $3,740.00 with interest * * * received by first party from said sale, shall be payable twenty-five per cent to first party and seventy-five per cent to second party." The promissory note is in ordinary form and contains in addition thereto the following clause: "Consideration of this note is option agreement dated April 14th, 1931. Should said agreement be satisfactorily consummated, this note is to be cancelled." The trial court found that the agreement never had been consummated and that the time to do so had expired.

Defendant makes two contentions on appeal: First, that the note and option should be read together as one agreement and that if so read together no liability attaches to the promissory note; and, second, that the evidence shows conclusively that there was no consideration for the promissory note.

[1] Reading the note and the contract together as contended for by defendant, it is quite clear to us that defendant's contention that no liability attaches upon the promissory note is without merit. The note contains an unconditional promise to pay. Defendant reads the phrase, "should said agreement be satisfactorily consummated, this note is to be cancelled," as though it read, "should said agreement *not* be satisfactorily consummated this note is to be cancelled." Manifestly, under the plain language of the combined instruments, defendant agreed to pay the money if the optional agreement were not consummated. No other construction may be reasonably placed upon the language used by the parties.

[2] With regard to defendant's contention that there was no consideration for the note, defendant does not undertake to set up all of the evidence with regard to consideration, and it is not the duty of this court to search the record in an effort to reverse the judgment of the trial court. However, the evidence which defendant does set up is substantial evidence tending to sustain the finding of the trial court that the consideration for the note was the optional agreement. Furthermore, in the absence of successful contradiction, this consideration is apparent from the following provisions of the contract: First, there is the optional right granted to defendant

to purchase the property during a period of two years and the forbearance of plaintiff for that period of time; second, there is the agreement that if in the event defendant obtains a purchaser for the property, then any and all money above the amount of the note should be payable 25 per cent. to plaintiff and 75 per cent. to defendant. Plaintiff's contention is without merit.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.

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9 Cal.App.2d 736

TURNER et al. v. CLENNELL et al.

Civ. 10412.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1935.

1. Automobiles 🔑247

Where some evidentiary findings regarding respective speeds of automobiles involved in collision were inconsistent with ultimate facts found, ultimate facts *held* controlling where evidentiary facts were not shown to be only facts proved from which ultimate facts were found.

2. Appeal and error 🔑989

Appellate court will not indulge in lengthy and dubious computations to determine that there is physical impossibility of truth of evidence supporting verdict.

3. Appeal and error 🔑1071(6)

In automobile collision action, court's failure to expressly find whether negligence of defendant was proximate cause of injury *held* not reversible error, where record on appeal did not show that evidence was introduced on such issue sufficient to sustain finding, since court assumed that finding on issue would have been adverse to plaintiffs.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Flora S. Turner and another against Hugh S. Clennell and another. From a judgment for the defendants, the plaintiffs appeal.

Judgment affirmed.

Frank G. Munroe and Arthur C. Webb, both of Los Angeles, for appellants.

Lasher B. Gallagher, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This appeal is from a judgment in favor of the defendants in an action arising out of an automobile accident. The appeal is on the judgment roll alone, and "the plaintiffs contend that the findings of fact, conclusions of law and judgment are so inconsistent and impossible [not with themselves, but] in relation to physical facts that said judgment should be reversed."

In order to make this unusual contention clear, it will be well to state it more fully, again in the language used by the plaintiffs: "The defendant Hugh S. Clennell, driving a Chrysler automobile in a westerly direction on Yucca Street, he said at less than 15 miles an hour, with good brakes with which he could stop within 7 feet, saw the Chevrolet about 40 feet to the north of the intersection of said streets, when he lacked 10 feet of entering the easterly line of Las Palmas. He testified that the Chevrolet was traveling at the rate of 30 miles per hour, and the plaintiff's daughter testified that she slowed down and stopped at said intersection. Las Palmas Avenue is admitted to be 40 feet in width and Yucca Street is 30 feet wide, *from curb to curb.* * * * *The inconsistency arises from the fact that upon these undisputed measurements,* had Miss Turner not slackened her speed at all, her Chevrolet would have traveled about 50 feet, in one second, and continued on. * * *" Much of the testimony above set forth is by some strange reason included in the findings. (Defendants contend that the findings were prepared by the plaintiffs, and this is supported in the record by the fact that the findings were served on the attorneys for the defendant before they were signed by the judge.)

[1, 2] The length of time it would require defendant Clennell to co-ordinate his nerves and muscles after he first saw the danger is not taken into consideration in plaintiffs' calculations. Furthermore, the findings covering the above evidence are merely evidentiary findings and not findings of the ultimate facts in the case. Findings, if any, with regard to the respective speeds of automobiles engaged in a collision, are ordinarily merely approxi-

mations. And it is well settled that the mere circumstance that some of the probative facts are inconsistent with the ultimate facts will not prevent the ultimate facts from controlling where such probative facts are not shown by the findings to be the only facts proved and from which alone the court finds the ultimate facts. 2 Cal. Jur. 872. No such showing appears in the record before us. Furthermore, an appellate court will not indulge in lengthy and dubious computations to determine that there is a physical impossibility of the evidence being true. 2 Cal. Jur. 938. Manifestly the judgment cannot be reversed upon this contention.

[3] There is no express finding that the negligence of the defendant Clennell was or was not a proximate cause of the injury to plaintiffs. The finding of the court in regard to negligence is as follows: "The court finds it to be true that the concurrent negligence of said Doreen Turner with said Hugh Clennell in entering said intersection as aforesaid, was the contributing cause of injuries to the plaintiff, Flora S. Turner." With regard to a similar situation our Supreme Court has said: "It is elementary that it is incumbent upon the appellant to show error by the record on appeal. * * * Even though it appears that the trial court failed to find on an issue raised by the pleadings, error cannot be predicated on such failure in the absence of a record showing that evidence was introduced on such issue sufficient to sustain a finding on behalf of appellant. 2 Cal. Jur. 525, § 262. In order to warrant the reversal of a judgment for failure to find on an issue, it must be shown by the record on appeal that evidence sufficient to sustain a finding for the complaining party was introduced. 24 Cal. Jur. 947, § 189. No such record has been presented. We must assume, therefore, that, had a finding been made on the issue, it would have been adverse to appellant." Delanoy v. Delanoy, 216 Cal. 23, at page 26, 27, 13 P.(2d) 513, 514. It must be assumed in the instant case that if there had been a finding on the issue of proximate cause it would have been adverse to the plaintiffs, whereas one of the essential elements of plaintiffs' recovery was that the negligence of the defendant was a proximate cause of the plaintiffs' injuries.

At the time of the accident the plaintiff Flora S. Turner was riding in the car of her eighteen year old daughter as a guest of the daughter, and the daughter was driving her car under an operator's license obtained on an application signed by the plaintiffs and each of them under section 62(b) of the California Vehicle Act, which at the time of the accident in question (St. 1923, p. 532, § 62(b), as amended by St. 1929, p. 522) read as follows: "Any negligence of a minor in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence." Much of the brief of the plaintiffs is given over to a discussion of the contention that the negligence of the daughter may not be imputed to the plaintiffs. But in the light of what has been said with regard to the failure on proximate cause plaintiffs are not entitled to recover in any event, and we shall not enter into a discussion of this problem.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

9 Cal.App.2d 661

MONTALBANO v. RAINBOW GARDENS, Limited, et al.

Civ. 9474.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

Master and servant ⚿302(3)

Defendant *held* liable for damages sustained by plaintiff when he was assaulted by person employed by defendant to maintain order in its dance hall, where person was not police officer but was defendant's agent and was acting within scope of his employment.

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Charles B. Montalbano against Rainbow Gardens, Limited, and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

See, also, 139 Cal. App. 379, 33 P.(2d) 844.

Joseph Musgrove and Thomas H. Cannan, both of Los Angeles (Fred O. McGirr, of Los Angeles, of counsel), for appellant.

Bernstein & Spizer, of Huntington Park, for respondent.

YORK, Justice.

Respondent brought this action in false arrest and imprisonment against the defendants and recovered a judgment for $535 for alleged damages sustained in an altercation between him and the defendant Barkley, at a time when the latter was employed by defendant corporation to protect its property, and preserve the peace thereon, in the conduct of a public dance hall in the city of Los Angeles. From the judgment so rendered, defendant corporation prosecutes this appeal.

This court appointed the trial judge as a referee, upon a written stipulation of the attorneys of record, to take additional evidence on the question of whether or not appellant's codefendant and employee, Barkley, was a police officer, special or otherwise, at the time respondent's cause of action accrued. The referee found that the said Barkley was not a police officer, special or otherwise, at the time respondent's cause of action accrued.

It is stated by respondent that the precise question presented by this appeal is this: "Is there sufficient evidence to sustain the findings that the appellant's codefendant was employed by appellant and was acting within the scope of his employment at the time he committed the assault upon respondent?"

An examination of the record discloses that, while there was a decided conflict in the evidence there was sufficient evidence to support such findings. The case of Maggi v. Pompa, 105 Cal. App. 496, 287 P. 982, has no value here by reason of the fact of the findings made by the referee hereinbefore set out.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

4 Cal.2d 469

PEOPLE v. DE MOSS.

Cr. 3871.

Supreme Court of California.
Oct. 22, 1935.

1. Homicide 🔑253(1)

Evidence *held* to sustain conviction for first-degree murder in husband's killing of wife.

2. Criminal law 🔑53

Voluntary intoxication is never an excuse for crime (Pen. Code, § 22).

3. Homicide 🔑270

Weight to be accorded to evidence of intoxication, and whether such intoxication precluded accused from forming specific intention to kill, which intent was necessary element in murder of first degree, are for determination of trier of facts (Pen. Code, §§ 22, 189).

4. Homicide 🔑157(2), 166(2)

In prosecution of husband for murder of wife, evidence tending to establish prior quarrels between wife and husband and making of threats by husband *held* properly admitted to show motive and state of mind of husband (Pen. Code, § 189).

5. Homicide 🔑294(2)

In prosecution for murder, instruction that insanity produced by intoxication does not destroy responsibility when party, when sane and responsible, made himself voluntarily intoxicated, and that drunkenness forms no defense to fact of guilt, *held* proper (Pen. Code, §§ 22, 189).

6. Criminal law 🔑763, 764(6)

In murder prosecution, giving of instruction that evidence of intoxication could only be considered by jury for purpose of determining degree of crime and for that reason it must be received with great caution *held* not prejudicial error (Pen. Code, §§ 22, 189).

7. Criminal law 🔑656(1)

Trial court may comment upon evidence as a whole or upon testimony or credibility of any witness, providing its comment is temperately and fairly made and is not argumentative or contentious to a degree which makes it characteristically an act of advocacy, although its comment need not be confined to a colorless recital by way of summing up the facts (Const. art. 6, § 19, as amended in 1934).

8. Criminal law 🔑762(3)

In prosecution of husband for murder of wife, action of trial court in commenting on evidence tending to militate against husband's contention that he loved wife and that shooting was accidental *held* not improper, especially where court stressed fact that jury was exclusive arbiter of questions of fact and of credibility of witnesses (Pen. Code, § 189; Const. art. 6, § 19, as amended in 1934).

In Bank.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Clarence De Moss was convicted of murder in the first degree without recommendation, and he appeals.

Affirmed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

In an information filed by the district attorney of the county of Merced, the defendant was charged with the murder of Mabel De Moss, his wife. He entered pleas of not guilty and not guilty by reason of insanity. The jury brought in a verdict of murder in the first degree without recommendation and a verdict that he was sane at the time of the commission of the offense. From a judgment imposing the extreme penalty and from an order denying a new trial, defendant prosecutes this appeal.

[1] The homicide was perpetrated on October 14, 1934, at a time when the parties were estranged. They had been living apart for approximately three weeks. The decedent, with four of the six minor children of the marriage, was then living with her parents. The defendant had two of the boys living with him. There is evidence in the record tending to indicate that on four occasions during the year preceding the homicide the defendant had been abusive to the decedent and had mistreated his family, causing the decedent to leave him on each occasion. At least upon one occasion during this period he became intoxicated and beat the decedent. There is evidence to the effect that on the day of the shooting, the defendant, accompanied by his two sons, drove his automobile to the place where the decedent was living with the other children. He did not enter the house but conversed with the decedent at the side of the automobile. At the conclusion of the

conversation the decedent departed for the house, and when about fifty or sixty feet distant from the automobile she received the gunshot wounds which caused her death. The attending physician testified that he saw the decedent at about 7:30 on the evening of the homicide; that she was suffering extreme shock from gunshot wounds over the right chest, back and side; that there were 160 punctures from the shots; and that she died from the gunshot wounds the following morning.

The defendant testified that on the day of the shooting he drove his automobile, accompanied by his two sons, to the place where the decedent was living with her parents; that it was then about dusk; that he did not enter the house but remained near his automobile and talked with his other children who had come out to greet him; that he sent one of the boys to the house to tell the decedent to come out to the automobile; that this invitation was declined and only after he threatened to take one of the girls back to town with him did the decedent leave the house and converse with him; that the children were then sent away to play; that he then kissed the decedent and asked her to return to him; that after some conversation she stated, "Well, probably in a short time we can fix things up"; that he kissed her again and she turned back toward the house; that he then called the boys for the return trip to town; that he thereupon undertook to remove a double-barreled shotgun, carried for hunting purposes, from the rear to the front of the automobile to have it available in the event a rabbit crossed his path on the return trip; that in so removing the gun it accidentally struck the back of the front seat of the automobile causing it to be discharged twice; that he heard some one scream; that he did not know "whether my wife had been hit or what it was"; that it was then dark; that he heard "somebody about * * * got excited * * * turned and ran"; that he was afraid to investigate because "if my wife was hurt, that I would get another beating up"; that he ran into a cornfield and "must have fainted or something"; that when he regained consciousness it was still dark, the moon was up, and he "did not know what to do"; that he did not realize what had happened and set out to walk to Turlock; that on the way he called for his overalls at a place where previously they had been left for repairs; that he there drank some whisky, put on the overalls, and set out to complete his trip to Turlock, getting an automobile ride part of the way; that during the day he had several glasses of whisky and some beer to drink; that he loved his wife and did not intend to injure or kill her.

There was evidence tending to show that the gun used by the defendant was found a few hundred feet from the scene of the shooting partly imbedded in sand and under a grape vine. Three persons who had heard, but did not witness, the shooting testified that the two discharges of the gun did not occur in rapid succession, but that from two to four seconds intervened between them. There is evidence to the effect that defendant stated in January, 1934, the next time any one interfered in his family affairs "some one would get killed" and that two or three weeks prior to the shooting he said that "if his wife would not live with him he would just see she did not live with any one." There is testimony that on the day preceding the shooting (Saturday) the defendant remarked as he left work that he would see the witness Monday morning if he (defendant) was not "in jail or shot." A newspaper man testified that he met the defendant early in the morning of the day following the shooting and that the defendant stated: "I know, I shot my wife, I will go with you, I won't run away." The defendant at the same time said the shooting was an accident.

An examination of the entire record satisfies us that there is sufficient evidence to warrant the implied finding of the jury that the shooting was deliberate and intentional and not accidental as contended by the defendant. The quarrels and separations of the parties, together with the threats of defendant, establish sufficient motive for the killing and militate against any theory of an accidental killing. Defendant's flight and change of clothes immediately following the shooting also tend to destroy his defense.

The jury's characterization of the homicide as murder of the first degree also finds support in the record. The evidence of intoxication, referred to by defendant in support of his argument for a reduction in the degree of the offense, is not such as to suggest that he was incapable of forming or entertaining the intent essential to murder of the first degree. At best, the record merely discloses that the defendant had three drinks of whisky early in the morning and two or three more glasses between 3 and 4 p. m. on the day of the shooting. He had also consumed a bottle or two of beer. The shooting, as stated above, did not occur until the end of the day, about dusk. Moreover, defendant's detailed recollection and minute description of the happenings immediately preceding the shooting tend to dispel any contention that his mind was so confused or disordered by the consumption of intoxicants as to relieve him from full responsibility for the ordinary consequences of his wrongful acts. This, and other evidence, may well have caused the jury to reject the defendant's evidence as to the extent of his intoxication and to conclude that he was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts.

[2, 3] Voluntary intoxication is never an excuse for crime. Section 22, Pen. Code; People v. Burkhart, 211 Cal. 726, 730, 297 P. 11. The weight to be accorded to evidence of intoxication, and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder of the first degree, are matters essentially for the determination of the trier of the facts. People v. Murphy, 1 Cal. (2d) 37, 40, 32 P.(2d) 635. As already indicated, we cannot say from an examination of the entire record that the defendant was so disordered mentally at the time of the shooting as to preclude the resulting homicide from being of that "willful, deliberate and premeditated" character designated in section 189 of the Penal Code as murder of the first degree.

[4] The several assignments of error having to do with the asserted improper admission of evidence tending to establish prior quarrels between the decedent and the defendant and the making of threats by the latter are clearly without merit. Such evidence was competent to show motive and the state of mind of the defendant. The objection that the evidence is remote goes to its weight rather than to its admissibility. People v. Wilson, 23 Cal. App. 513, 515, 521, 138 P. 971. Other rulings complained of present nothing approximating error.

[5] Defendant contends that it was prejudicial error for the court below to give the following instruction: "You are instructed that it is a well-settled rule that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of such intoxication can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

It is urged that the early part of the instruction having to do with insanity is erroneous in that insanity produced in any manner, by intoxication or otherwise, is a defense to criminal prosecution. An instruction in substantially the same language was approved in People v. Jones, 63 Cal. 168, 169. It is there declared: "Insanity, from the long continued use of intoxicants, was the only defense made on behalf of the defendant. In substance the court charged the jury to the effect that insanity produced by intoxication would not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated, and that drunkenness was no excuse for crime, but it was a circumstance for the consideration of the jury in determining the degree of the crime. The charge upon the subject in the very language by which it was given to the jury was considered and approved by this court in the cases of People v. Ferris, 55 Cal. [588], 592; People v. Williams, 43 Cal. [344], 345; People v. Lewis, 36 Cal. 531."

Moreover, the court below charged the jury in the exact language of section 22 of the Penal Code, as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

[6] Complaint is also made of the latter part of the instruction informing the jury that evidence of intoxication may only be considered for the purpose of determining the degree of the crime "and for that purpose it must be received with great caution." The quoted language was held not to be prejudicial in People v. Nihell, 144 Cal. 200, 203, 77 P. 916, 917, wherein it is stated: "Instructions to the effect that evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose 'it must be received with great caution,' have also been often considered by this court, and it is apparently well settled that a judgment will not be reversed for the giving of such an instruction. People v. Vincent, 95 Cal. [425], 428, 30 P. 581; People v. Methever [132 Cal. 326, 64 P. 481], supra. As was said, however, in People v. Suesser [142 Cal. 354, 75 P. 1093], supra, of the instruction regarding the care with which the defense of insanity should be regarded, so of this; so far as it cautions the jury that evidence of drunkenness shall be received with caution, 'it would be better if such instruction were omitted altogether.' We know of no rule of law which, in view of our constitutional provision as to charging juries upon matters of fact, justifies the giving of such instructions, but we cannot see that the giving of the same could have affected the substantial rights of the defendant."

[7, 8] We cannot agree with the defendant's final contention that the court below exceeded the bounds of propriety or went outside the record in its brief comment on the evidence. As amended in 1934, section 19 of article 6 of the Constitution provides: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." It is unnecessary to quote the court's statement to the jury. During its comment, the court on more than one occasion impressed upon the jury, as required by the constitutional provision, that it was the final and exclusive arbiter of questions of fact and of the credibility of the witnesses and was in no way bound by any view or opinion expressed by the court. It then proceeded to briefly narrate a few circumstances developed by the evidence and tending to militate against the defendant's contention that he loved the decedent and that the shooting was accidental. In our opinion, the comment was within the record, or inferences fairly deducible therefrom, and was warranted under the terms of the constitutional provision. No portion of such comment is an "out and out prosecutor's argument," as urged by the defendant. A trial court may, under the constitutional provision, comment upon the evidence as a whole or upon the testimony or credibility of any witness providing its comment is temperately and fairly made and is not argumentative or contentious to a degree which makes it characteristically an act of advocacy. Its comment is not confined to a colorless recital, by way of summing up the facts. Such a conclusion would destroy and render ineffectual the very purpose of the constitutional amendment. It is impossible to set down a hard and fast rule, each case must necessarily turn upon its own peculiar circumstances. Trial courts should, of course, be cautious in their exercise of this power with a view to protecting the rights of defendants. An examination of the federal cases on the subject indicates that while the trial court may not direct a verdict of guilty, either directly or indirectly, it may analyze the evidence and comment and express its views with regard to the testimony of the witnesses, leaving the ultimate determination of the issues of fact fairly to the jury. The authorities are collected in a note in 95 A. L. R. 785. In People v. Talkington (Cal. App.) 47 P. (2d) 368, "the comment" of the trial court was obviously contentious in character and for all practical purposes directed the return of a verdict of guilty. The comment of the court below in the present case did not, in our opinion, violate any of the defendant's rights and was fair and warranted by the evidence and the constitutional provision above quoted.

The judgment and order are, and each is, affirmed.

We concur: SEAWELL, J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

4 Cal.2d 477

BANK OF AMERICA OF CALIFORNIA v. CITY OF GLENDALE.

L. A. 15187.

Supreme Court of California.
Oct. 22, 1935.

1. Eminent domain 🔑167(1)

Where general provisions of Code relating to eminent domain were inconsistent with Street Opening Act, provisions of such act prevailed and governed rights of parties to condemnation proceeding under such act (St. 1903, p. 376, as amended; Code Civ. Proc. §§ 1237-1264).

2. Eminent domain 🔑246(2)

"Final judgment," as used in Code provision that plaintiff may abandon condemnation proceedings instituted under general provisions of Code at any time after filing complaint and before expiration of 30 days after final judgment, means the interlocutory judgment fixing the award or amount of damages to which defendant in proceedings is entitled (Code Civ. Proc. § 1255a).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

3. Eminent domain 🔑153

Deed executed by owner of lots during period when by terms of Street Opening Act city had right to abandon condemnation proceedings carried with title to lots right to collect condemnation award, and hence award was properly paid to party holding title at time of payment, where conveyances eventually vesting title in him were all made without reservation of right to award and while city had right to abandon proceedings (St. 1911, p. 894, § 14).

4. Eminent domain 🔑153

Immediate grantee of owner of lots, even if he were assumed to have acquired right to condemnation award by virtue of assignment and not by conveyance of lots, *held*, by conveying lots to another while he was owner of both award and lots by grant deed without reservation as to award, to have passed right to award with title to lots, and hence award was properly paid to party holding title at time of payment, where conveyances eventually vesting title in him were all made without reservation and while city had right to abandon condemnation proceedings (St. 1911, p. 894, § 14).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by the Bank of America of California against the City of Glendale. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Prior opinion, 39 P.(2d) 280.

Bernard Brennan, City Atty., Aubrey N. Irwin, Asst. City Atty., and A. L. Lawson, Deputy City Atty., all of Glendale, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondent.

CURTIS, Justice.

The city of Glendale instituted proceedings under the Street Opening Act of 1903 (St. 1903, p. 376, as amended) to widen Colorado street in said city by taking a strip ten feet in width from all lots fronting upon said street. At that time M. Khodigian was the owner of certain lots fronting said street and was named as a defendant in said action. A lis pendens was filed for record on the day the action was instituted. On November 1, 1926, an interlocutory decree was entered in said action awarding defendant Khodigian the sum of $2,937.20 as compensation for that portion of the frontage taken from his said lots. On December 14, 1926, Khodigian by grant deed conveyed said lots to B. H. Brown, who was at all times mentioned herein acting for the Merchants National Trust & Savings Bank. At the same time Khodigian executed an assignment of his interest in said award to Brown. This assignment was never recorded. Brown, on December 31, 1926, by grant deed conveyed said lots to one Eversole, and by like conveyances Eversole conveyed said lots to one Bernheim on February 25, 1927, and Bernheim on May 6, 1927, to W. K. Jewett. Each of these grant deeds described the lots, including that portion sought for street purposes, without exception, reservation, or agreement concerning the portion thereof sought to be condemned, or the disposition of compensation therefor, and were duly recorded. After Brown had conveyed by grant deed said lots to Eversole, and on February 28, 1927, he executed an assignment of said award to his principal, the Merchants National Trust and Savings Bank, and said bank on or about April 29, 1927, filed a petition in said condemnation proceedings praying that it be substituted as a party defendant in the place of Khodigian and that said award be paid to said bank. Duplicate originals of said assignments were filed with said petition, and a copy of the petition with copies of said assignments was served on the city attorney of the city of Glendale, but said petition was never heard or considered by the court. The plaintiff herein, as the successor in interest of said bank, subsequently succeeded to whatever interest said bank acquired in said award by the assignment to it from Brown. Neither the assignment of said award by Khodigian to Brown, nor that by Brown to the bank, was ever recorded. In due time the city of Glendale levied an assessment in accordance with the provisions of the Street Opening Act of 1903 for the purpose of paying the awards and incidental expenses involved in said condemnation proceeding. The amount of said assessment against those portions of said lots belonging to Khodigian at the commencement of said action, and not taken for street purposes, was fixed and determined to be the sum of $3,202.03. On October 8, 1927, Khodigian executed a satisfaction of judgment in duplicate of said award, together with a written demand for offset of said assessment by the amount of said award (the amount of which was $2,937.20), which satisfaction and demand for offset were delivered to the street superintendent of said city by William K. Jewett, who at that time, as we have shown, was the owner of said lots. The difference between said award and said assessment was paid to the superintendent of streets by Jewett, and that official complied with said demand for offset and filed a duplicate satisfaction of judgment and demand with the clerk of the court in which said condemnation proceedings were pending, as provided by the provisions of said Street Opening Act. Prior thereto neither Jewett nor said superintendent of streets had any notice or knowledge of any of the aforesaid assignments or of any agreement that Jewett, as purchaser, would not be entitled to said award, except such notice as might be implied from the facts above stated. On April 18, 1928, final judgment of condemnation was made and entered in said action. Prior to the entry of said first judgment, the city of Glendale had not entered upon nor taken for street purposes any portion of the lots herein mentioned. On February 27, 1930, the plaintiff herein, as the successor in interest to the Merchants National Trust & Savings Bank, regularly filed a claim with the city of Glendale demanding the amount of said award, which claim was thereafter denied. Upon the refusal of the city of Glendale to pay said claim, the plaintiff herein instituted this action to recover from said city of Glendale the amount of said award. The parties to said action stipulated to the facts of the case, as set out above, and in accordance with said statement of facts the trial court made findings and rendered judgment in favor of plaintiff for the amount of its said claim and interest. From this judgment the city of Glendale has appealed.

[1] The contention of appellant is that, where real property subject to pending condemnation proceedings is purchased prior to the time the condemnor may voluntarily abandon said proceedings, and the deed conveying said property is silent as to the award money to be paid in said proceedings, in the absence of any agreement of the parties to the contrary, said money belongs to the purchaser.

The condemnation proceedings, in which the award involved herein was made, were instituted and prosecuted under the Street Opening Act of 1903, and not under the general provisions of the Code of Civil Procedure (§§ 1237 to 1264). Where the general provisions of the Code relating to eminent domain are contrary to or inconsistent with the provisions of the Street Opening Act of 1903, the latter prevail and control and govern the rights of the parties to said proceeding. City of Los Angeles v. Agardy et al., 1 Cal. (2d) 76, 80, 33 P.(2d) 834, City of Los Angeles v. Abbott, 217 Cal. 184, 17 P.(2d) 993, and Frank v. Maguire, 201 Cal. 414, 257 P. 515.

[2] By section 1255a of the Code of Civil Procedure, the plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment. It has been held that "final judgment" as used in this section means the interlocutory judgment fixing the award or amount of damages to which the defendant in the proceedings is entitled. McDaniels v. Dickey, 219 Cal. 89, 92, 25 P.(2d) 404. Section 14 of the Street Opening Act of 1903 (St. 1903, p. 379, § 14, as amended by St. 1911, p. 894) provides that: "The city council may, at any time prior to the payment of the compensation awarded the defendants,

abandon the proceedings, by ordinance, and cause the said action to be dismissed." It thus appears that there is a marked difference in the two modes of procedure. In one case the proceedings may be voluntarily abandoned only within the thirty-day period immediately following the date of the interlocutory judgment, and in the other the city or condemnor has the right to abandon said proceedings at any time prior to the payment of the award.

[3, 4] The deeds under which the city of Glendale justifies its payment of said award to Jewett (by having the amount of said award offset against the assessment), that is, the deeds through which Jewett acquired Khodigian's title to said lots, were all executed after the date of said interlocutory judgment and long prior to payment of said award and during the time when the city could have voluntarily abandoned said proceedings and dismissed the condemnation action. None of said deeds, as we have seen, contained any reservation of or any reference to said award. The law seems to be well settled, at least outside of this state, that a deed executed under those conditions conveys and transfers to the purchaser the right to the award. We will later refer to the California cases bearing upon this question. Among the authorities supporting the above statement the following may be cited: 20 Cor. Jur. 862; Hamilton v. Big Medicine Drainage Dist. No. 1, 217 Mo. App. 247, 261 S. W. 940; Griffeth et al. v. Drainage District No. 41, 182 Iowa, 1291, 166 N. W. 570; Charde v. City of Brooklyn, 8 Misc. 598, 29 N. Y. S. 390; In re Twelfth Avenue South, 74 Wash. 132, 132 P. 868, Ann. Cas. 1915A, 730; Obst v. Covell, 93 Minn. 30, 100 N. W. 650; Gates v. De La Mare, 142 N. Y. 307, 37 N. E. 121; Meginnis v. Nunamaker, 64 Pa. 374.

The rule as stated in Corpus Juris, supra, is as follows: "Where land is sold subsequent to the award but before payment is made or security given by the condemnor, and the conveyance is silent as to the right to damages, such right passes to the purchaser."

The Supreme Court of Washington states the rule and the reason therefor in Re Twelfth Avenue South, supra, quoting from its decision in Damon v. Ryan, 74 Wash. 138, 132 P. 871, Ann. Cas. 1915A, 734, in the following clear and concise language: "Where the conveyance of the land pending condemnation is by deed, without reservation, the only certain and just rule is that the money to be paid for the right to take or damage the property shall be paid to the person or persons owning the property or having an interest therein at the time when the condemnation has reached that point of completion where it is not subject to abandonment and when the right to the compensation becomes an enforceable demand against the condemnor."

We might continue to quote excerpts from the authorities cited above, but those set forth above are sufficient to demonstrate the true rule in jurisdictions generally in this country. Respondent has not called to our attention a single case which tends to hold that the rule outside of this state is not as enunciated in the authorities just cited. While not directly admitting that the rule in other jurisdictions is adverse to its contentions, it virtually concedes the force and effect of the authorities herein cited by its failure to call to the attention of this court any adverse ruling, either conflicting with or qualifying the rule announced therein. It is clear, we think, that respondent relies upon certain California cases in support of its right to receive payment of said award, and we will proceed to discuss them. The following five cases deal with the question involved herein, four of them directly, and one only indirectly: Russakov v. McCarthy Co., 206 Cal. 682, 275 P. 808; Security Co. v. Rice, 215 Cal. 263, 9 P.(2d) 817, 82 A. L. R. 1059; McDaniels v. Dickey, 219 Cal. 89, 25 P.(2d) 404; Tom v. Eddy, 137 Cal. App. 577, 31 P.(2d) 443, and City of Los Angeles v. Agardy, 1 Cal. (2d) 76, 33 P.(2d) 834. While respondent relies only upon the last two of these cases, we think a brief discussion of all five of them may be advisable.

Before discussing these cases, it might be well to state the position of the respondent. It contends that a purchaser of property involved in a condemnation action under the Street Opening Act of 1903, who becomes such after thirty days from the date of the interlocutory decree and before the award is paid under a conveyance which is silent as to the award, has no right to the award, but that the right to the award is then separated from the realty itself and does not pass by a conveyance of the latter. It claims, therefore, that, when Brown by his deed from

Khodigian, made more than thirty days after the interlocutory decree, became the owner of the lots involved herein, he did not become entitled to the award by virtue of his deed, but that he acquired a right to the award through the assignment thereof from Khodigian. From this premise respondent argues that, when Brown conveyed by grant deed without reservations the real property to Eversole, the predecessor in interest of Jewett, no right to said award passed to Eversole by said grant deed. Respondent concedes that a deed to the real property without reservations made prior to the interlocutory decree passes title to the award to the grantee. Both Russakov v. McCarthy Co., supra, and Security Co. v. Rice, supra, involved grants which were executed prior to the entry of the interlocutory decree. They are therefore not determinative of any question now before us, although each of these cases contains language most favorable to the appellant, and on which the appellant relies in support of its appeal. But, for the reason just stated, neither of these cases is helpful for our present purposes. The case of City of Los Angeles v. Agardy et al., supra, is important only in that it holds that section 1251 of the Code of Civil Procedure is not applicable to proceedings under the Street Opening Act of 1903. Appellant has cited this case, but, as the point therein involved is not seriously questioned by respondent, we may dismiss this case without further comment.

We now pass to the discussion of McDaniels v. Dickey, supra, and Tom v. Eddy, supra, on which respondent relies in support of its contention that the deed from Khodigian to Brown, executed more than thirty days after the entry of the interlocutory decree, did not vest in Brown the right to the money awarded to Khodigian by said interlocutory decree, but that Brown by the separate assignment from Khodigian acquired the absolute right to said award, and that, when Brown conveyed said lots to Eversole without any reservation, he did not convey or transfer to his grantee the right to the award. In discussing this case it must be remembered that the condemnation proceedings involved herein are under the Street Opening Act of 1903, and not under the general sections of the Code of Civil Procedure governing that subject, nor should we lose sight of the fact that under the terms of the Street Opening Act the city has the right to abandon the proceedings at any time before the award is paid, while the right to abandon proceedings under the general sections of the Code of Civil Procedure is fixed at thirty days after the date of the interlocutory decree. Construing the case of McDaniels v. Dickey most favorably to the respondent, the court there held that a grantee of real property who took the same by deed executed more than thirty days after the interlocutory judgment (in that case the time was one month and two days) in a condemnation proceeding which provided for the payment of compensation to the grantors was not entitled to the compensation awarded by said judgment as against said grantors. In other words, respondent construes this decision as holding that, after the period of thirty days has elapsed from the date of the interlocutory judgment, the award accrues to the original owners of the land, the right thereto is then separated from the land itself, and does not pass under a grant deed by said grantors. Applying this construction of said decision to the facts of the present case, the respondent contends that, as the deed from Khodigian to Brown was executed over thirty days after the interlocutory judgment, Brown acquired no right by virtue of said deed to the award, and furthermore, when Brown conveyed said lots to Eversole, the latter acquired no right to said award. If the case of McDaniels v. Dickey was decided under an understanding that the condemnation proceedings therein involved were being taken under the Street Opening Act of 1903, then there are some grounds for respondent's contention. We think, however, that it plainly appears from the face of the opinion that this court in its decision of that case had in mind the general provisions of the Code of Civil Procedure relating to condemnation proceedings and not those of the Street Opening Act of 1903. No reference is made in the opinion to the Street Opening Act of 1903, nor to any section of said act. On the other hand, the court cites sections 1251, 1252, and 1255a of the Code of Civil Procedure, and bases its decision upon the last-named section, which provides that the condemnor may abandon the proceedings at any time before the expiration of thirty days after the final judgment, which, following prior decisions of this court, meant the interlocutory judgment. The judgment in that action was rendered after the sustaining of a general demurrer to the complaint. While we have not been able to obtain the record in that case, we gather from respondent's briefs that it concedes that there is nothing in said complaint to indicate that the condemnation proceedings out of which said action arose were brought under the Street Opening Act of 1903. Respondent relies upon certain statements in the briefs in that case, and in a decision of that case by the District Court of Appeal which was subsequently set aside, to support its claim that the award which was the bone of contention in that action arose out of condemnation proceedings brought under the Street Opening Act of 1903. Conceding that these references in the briefs and in said opinion of the District Court of Appeal were as claimed by respondent, yet a reading of the opinion in the case of McDaniels v. Dickey, as we have indicated above, shows conclusively that this court in its decision had in mind, and the case was decided upon, the general provisions of the Code of Civil Procedure relating to condemnation proceedings, and not upon the provisions of the Street Opening Act of 1903. The thirty-day period within which a condemnor may abandon proceedings in condemnation is not to be found in the Street Opening Act of 1903, but is expressly provided for in section 1255a of the Code of Civil Procedure, which, as we have seen, was the foundation of the court's decision in that case. Therefore the claim that the case of McDaniels v. Dickey applies to proceedings brought under the Street Opening Act of 1903 and governs or in any way controls the question now before us in the instant case is absolutely groundless. The case of Tom v. Eddy, supra, was decided solely upon the authority of McDaniels v. Dickey, and apparently upon the assumption that the latter case involved a condemnation proceeding under the Street Opening Act of 1903, when, as we have shown, the opinion in McDaniels v. Dickey, supra, makes no reference to said act, but expressly cites sections of the Code of Civil Procedure, showing that the court had in mind the general law respecting condemnation proceedings and not any special act.

From a review of these cases, we are of the opinion that the law of this state as found in our statutes and as declared by our courts is not inconsistent with or contrary to the general law upon the subject involved and as declared and set forth in the authorities hereinbefore cited and the excerpts therefrom quoted above. Under these authorities the deed from Khodigian to Brown, having been executed during that period of time when by the terms of the Street Opening Act of 1903 the city had a right to abandon the condemnation proceedings, carried with the title to the lots the right to collect the award. Therefore Brown acquired the right to this award by the terms of the deed and not by virtue of the assignment. But, even should we concede that Brown, under his understanding with Khodigian in securing a separate assignment of the award in addition to the grant deed to the lots, acquired the right to the award by virtue of the assignment, yet, when he subsequently and while he was the owner of both the award and the lots by grant deed without any reservation as to the award, conveyed the lots to Eversole, the right to the award passed with the title to the lots. Jewett subsequently through grant deeds acquired title to the lots while the city of Glendale still had the right to abandon the condemnation proceedings. The right to the award followed the title to the lots and was in Jewett at the time the award was paid by the city of Glendale. The award, therefore, was properly paid to Jewett, and the asserted rights of the plaintiff in this action are without legal foundation.

We do not mean to hold that Khodigian or Brown, or any of the intervening owners of said lots, could not have conveyed the right to said award separate and apart from the title to said lots, had either of them so provided in his deed or other conveyance. But, as we have pointed out, each of these parties in conveying said lots did so by grant deed without any exception, reservation, or reference to said award. Under these deeds the award followed the title to the lots and vested in the grantees as part of the real property.

There is no merit in respondent's contention that the city of Glendale had notice that Khodigian had conveyed his interest in said award to Brown by a separate written assignment. This contention is based upon the notice of motion served by the Merchants National Trust & Savings Bank, with duplicate copies of said assignment. Assuming that Brown acquired title to said award through said written assignment, as we have just stated, his subsequent grant deed to Eversole conveyed to the latter all Brown's interest in said award. So, even if Brown acquired the right to said award through said written assignment, he parted with such right before he attempted to assign it to the bank.

For the reasons expressed herein, the judgment is reversed; and, as the facts as found by the court were all admitted by written stipulation of the parties, and as so stipulated were carried into the findings, the trial court is directed to enter judgment in favor of appellant upon the facts found by the court.

We concur: WASTE, C. J.; SEAWELL, J.; CONREY, J.; SHENK, J.; THOMPSON, J.

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4 Cal.2d 488

KABISIUS v. BOARD OF PLAYGROUND AND RECREATION OF CITY OF LOS ANGELES et al.

L. A. 15181.

Supreme Court of California.

Oct. 22, 1935.

Rehearing Denied Nov. 21, 1935.

1. Mandamus 🔑168(4)

Evidence that municipal department received income for fiscal year of $116,000 less than expected, and that temporary beach guards performed necessary work, *held* to support findings that beach guard was laid off because of lack of funds, and that there was not sufficient work to necessitate employment of all persons working for department.

2. Municipal corporations 🔑218(1)

Board of playground and recreation *held* authorized under city charter to terminate employment of beach guard, where board lacked necessary funds to retain all regular employees.

3. Municipal corporations 🔑218(8)

City employee *held* effectively removed from service by written notice stating that his employment was "terminated" because of lack of funds, instead of using word "suspended," as contained in provision of city charter relating to such removal.

4. Appeal and error 🔑891

Appellant *held* not entitled to submit additional evidence on appeal, where such evidence, if admitted, would not compel reversal of judgment with directions to enter judgment for appellant (Const. art. 6, § 4¾).

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Petition by Charles W. Kabisius for a peremptory writ of mandate against the Board of Playground & Recreation of the City of Los Angeles and others. From a judgment denying the writ, petitioner appeals.

Judgment affirmed.

Prior opinion, 39 P.(2d) 264.

Charles W. Kabisius, in pro. per.

Ray L. Chesebro, City Atty., Erwin P. Werner, former City Atty., Frederick Von Schrader and Loren A. Butts, Asst. City Attys., and Jerrell Babb, Joseph T. Watson, and G. Ellsworth Meyer, Deputy City Attys., all of Los Angeles, for respondents.

THOMPSON, Justice.

About a year prior to October 3, 1930, the petitioner herein had become a permanent employee as a beach guard in the department of recreation and playground of Los Angeles city. On September 6, 1930, he was notified by a Mr. Drake, director of beaches, that he would be laid off at the end of the month owing to a lack of funds. On the day following, September 7th, the supervisor of aquatics, in the presence of Drake and other beach guards, again notified petitioner of the intended lay off. On October 3, 1930, the petitioner received through the mail the following letter addressed to him:

"Dear Mr. Kabisius: You are hereby notified that your vacation due you has been adjusted. You will have your vacation up to and including the 8th of October. You will thereafter be terminated on October 9th, according to Rule 9, Section 1 of the charter of the City of Los Angeles, which covers reduction of force for lack of work and lack of funds.

"Yours very truly,
"Department of Playground and Recreation,
"C. P. L. Nicholls, Supervisor of Aquatics."

Subsequently the civil service commission of the city investigated petitioner's suspension and on March 19, 1931, ordered that he be reinstated on the theory that the department had been employing intermittent beach guards to do the work which should have been assigned to him. Thereafter, and on April 12, 1931, petitioner accepted temporary employment for a period of six months, which expired October 11, 1931. Prior to this last-mentioned date petitioner filed this action to compel the department to restore him to his former position and to certify to the controller of the city his salary for the period from October 10, 1930, to April 11, 1931.

[1] The trial court found, among other things, that the petitioner "was duly and regularly laid off by the respondent Raymond E. Hoyt, the general manager of the Department of Playground and Recreation of the City of Los Angeles, which action of the said Raymond E. Hoyt was duly and regularly approved by the Board of Playground and Recreation Commissioners; that said petitioner was laid off for the reason that said Department of Playground and Recreation had no funds with which to pay the salary of the petitioner herein; that at the time the petitioner herein was laid off, there were one hundred and nine other employees of the said Department of Playground and Recreation laid off for the same reason, to wit, lack of funds." There are additional findings to the effect that it was determined there was not sufficient work to necessitate the employment of all the persons working for the department; that it was further determined that the department would receive an income less than it had anticipated for the fiscal year 1930–1931; that it actually received $116,000 less; and that it was not true there was not a lack of work and a shortage of funds; and that petitioner "was laid off in good faith by the Department of Playground and Recreation for the reason that there was a shortage or lack of work in said department and a lack of funds with which to continue to employ and pay said petitioner."

From a judgment denying him a peremptory writ of mandate, the petitioner prosecutes this appeal. It was petitioner's theory in the trial court, disclosed by his allegations, that his employment was not terminated by reason of lack of funds or shortage of work, but because of an unfounded and unjustifiable prejudice against him. He now asserts that the findings to the contrary are not supported by the evidence. We cannot agree with appellant.

The record discloses that the charter appropriated for the financial support of the department of playground and recreation an annual sum of not less than 4 cents on each $100 of property assessed for city taxes. In adopting its budget for the fiscal year 1930–1931, the department was advised to calculate its income on an assessed property valuation of $1,900,000,000. However, in September it developed that the assessed value would be but $1,780,960,880, producing $47,615.65 less tax income for the department than anticipated. In addition, by reason of having to close swimming pools during the summer of 1930, the revenue therefrom dropped $19,615 below that anticipated. From all sources the department received $836,154 while it had calculated its budget on the basis of an income of $952,573. It thus appears that not only did the department foresee a lessening of its annual income, but also it did have $116,000 less than it originally expected. The record also discloses that at the time appellant was suspended or his employment terminated the superintendent or general manager of the department proposed and submitted to the board of playground and recreation a list containing the names of 109 others who had been laid off. It further appears that from October, 1930, to and including March, 1931, temporary guards working intermittently, or being subject to call particularly on Saturdays and Sundays and holidays, performed the necessary work. Appellant was offered this kind of work but declined, according to his testimony, because he was requested to resign his regular employment, although, as noted heretofore, he did work six months during the spring and summer months of 1931. We have related sufficient of the testimony to show that the findings in their essential elements are supported by the evidence. It is manifest that the department would be perfectly fair if in an effort to economize it determined that it could function by its intermittent employment of guards instead of hiring men for full time. It is only just to add that the record discloses that a number of economy measures were in the mind of the board other than the suspension of employees.

[2] It is also asserted that the respondents did not have the right to terminate appellant's employment. This contention is founded upon the wording of the charter

provisions to which we will now refer. Section 112(a) in its pertinent provisions reads as follows: "Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, *discharge* or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, *discharged* or suspended except *for cause*, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the board upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided that the order of any appointing board or officer *suspending* any person *because of lack of funds* in such department *shall be final* and *not* be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer." (Italics ours.)

It is immediately apparent from a reading of the quoted section that in case the suspension is for lack of funds the order of the appointing power is final and that there is no review to be had before the board of civil service commissioners. This must necessarily be so, otherwise the political subdivisions, acting through their regularly elected or appointed officers, might have extreme difficulty in effecting economy measures. In fact the authorities are legion to this effect. In the case of Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797, 800, in which case there was apparently no such saving clause as the one italicized here, the court cites and quotes from a number of cases to support the statement of its own opinion as follows: "That section" [a section similar to the restriction of the section herein involved against removal except for cause] refers to cases where an officer or employee is removed for some reason personal to himself. His right to be heard in his defense upon written charges, as specified in section 12, implies that the cause of his removal is some dereliction, or neglect of duty, or incapacity to perform duty, or some delinquency, which affects his fitness for the position occupied by him. The provision in question does not apply to a case where the incumbent is dismissed for want of funds, or in order to reduce expenses, and when at the time of the dismissal, as was the fact in the case at bar, he has notice of that fact." Reference is made to the case of People ex rel. Corrigan v. City of Brooklyn, 149 N. Y. 215, 225, 43 N. E. 554, 556, from which the following apt language is quoted: "While these statutes are positive in form, it is clearly not their intent to give to occupants of such positions a life tenure, where, upon grounds of economy or for other proper reasons, the office or position is in good faith abolished." Also a long list of authorities are cited in Lyon v. Civil Service Commission, 203 Iowa, 1203, 212 N. W. 579, 582, to sustain this statement: "So far as our attention has been directed to the decisions of the courts in other jurisdictions, they unanimously recognize a distinction between the discharge of an employee by his superior for cause and the dismissal or discharge thereof where a reduction in the number is sought." To the same effect are the authorities in our own state. In O'Neill v. Williams, 53 Cal. App. 1, 199 P. 870, 871, a case involving a reduction in the police department, the District Court of Appeal, speaking through Mr. Presiding Justice Waste, said: "It is equally well established by the decisions of the courts of many states that provisions restricting the power of removal, similar to those found in the civil service provision of the Oakland city charter, refer to removals for lapse of duty and the like, and are not a restriction upon the power of the council to abolish as many of the places or offices once provided for as it chooses, by abolishing the offices or places themselves, provided such action be taken in good faith." To the same general effect are Jenkins v. Board of Civil Service Commissioners, 137 Cal. App. 410, 30 P.(2d) 606, and Livingstone v. MacGillivray, 1 Cal. (2d) 546, 36 P.(2d) 622. The record in this case is singularly free from any evidence that the action of the department was not in good faith.

[3] However, it is contended, inasmuch as the written notice to appellant said his employment was terminated, instead of using the word of the section, to wit, "suspended," that appellant was not effectively removed from the service. Aside from the two oral notices we think the letter clearly expresses the intention of the department to remove appellant from the service as an economy measure. In view of the state of the law hereinbefore set forth, we are constrained to hold that no such narrow interpretation of the section can be indulged. The proviso was intended to declare the right of the city to reduce its forces when such was necessary or advisable as a matter of economy.

[4] The appellant has filed an application to submit additional evidence for the purpose of inducing a reversal of the judgment. The purpose and intent of section 4¾ of article 6 of the Constitution and legislation enacted pursuant thereto was fully analyzed and discussed in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 975. It was there said: "We are convinced that it was not the intention of the new law that the reviewing courts should develop generally into trial courts; that it was contemplated that the courts of appellate jurisdiction would exercise the new power sparingly and, as a general rule, would exercise it only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to the trial court to enter a judgment for the appellant." We have read the proposed evidence carefully. If admitted it would not compel a reversal of the judgment with directions to the trial court. It is true that it tends to prove that not all of the 109 other employees were discharged for the expressed reason of lack of funds, but it does establish that some of them were discharged for that very reason. It also tends to prove that at the end of the fiscal year the department closed its books with a substantial net income, but aside from the fact that the department is burdened with the responsibility of determining what economies should be practiced, is the fact that we have no way of telling what portion of the net income was the result of other measures adopted during the year.

There are no other points requiring discussion.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

10 Cal.App.2d 38

GURLEY LORD TIRE CO. v. NEWGARD et al.

Civ. 9798.

District Court of Appeal, First District, Division 2, California.

Nov. 6, 1935.

Hearing Denied by Supreme Court Jan. 2, 1936.

1. Highways 🔑113(5)

Tires and tubes rented to subcontractor and used by him on trucks employed in public highway construction job, though not entirely used or consumed in construction, *held* within statute providing for indemnity bond covering certain claims arising from public works contract, regardless whether tires and tubes were "implements" or "supplies" within statute (Gen. Laws 1931, Act 6423, § 2).

2. Highways 🔑113(5)

That employee of tire company which rented tires and tubes to subcontractor to be

used on trucks employed in public highway construction job remarked to contractor's employee that tire company might "take a chance" on subcontractor's ability to pay *held* not to estop tire company to recover against contractor and bondsmen, where no change of position or injury from any act of tire company was shown (Gen. Laws 1931, Act 6423, § 2; Code Civ. Proc. § 1962, subd. 3).

3. Highways ⊂⊃113(5)

Burden of proving that tire company which rented tires and tubes to subcontractor to be used on trucks employed in public highway construction job, was estopped from maintaining action against contractor and bondsmen for rental thereof, was upon contractor and bondsmen (Gen. Laws 1931, Act 6423, § 2; Code Civ. Proc. § 1962, subd. 3).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Gurley Lord Tire Company against P. M. Newgard and others. From a judgment for the plaintiff, defendants Basich Brothers Construction Company, the American Bonding Company of Baltimore, and the Hartford Accident & Indemnity Company appeal.

Judgment affirmed.

Stephen Monteleone, of Los Angeles, for appellants.

Cooley, Crowley & Supple, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued and recovered on an express contract for the rental of forty-eight tires and forty-eight tubes supplied to a subcontractor and used by him on trucks employed in a public highway construction job.

The trial court found: "That said supplies and materials above mentioned, to wit, use and rentals of forty-eight tires and forty-eight tubes, were furnished to be used and were actually used in, upon, for and about the performance of the work contracted to be executed and performed by the terms of said contract between the state of California and Basich Brothers Construction Company on the main job and the Sunnyvale extension or 'airport job' under contract 44TC2; that said supplies and materials contributed to said work to be done; that the value of said tire rental is $3,768.96, which amount the court finds to be the reasonable value of said rental."

Plaintiff's claim rests on the statute of 1919 to secure payment of claims in relation to contracts for public works. Deering's Gen. Laws 1931, Act 6423. Section 2 of the act provides in part: "Any materialman * * * furnishing materials, provisions, provender or other supplies used in, upon, for or about the performance of the work contracted to be executed * * * or * * * renting or hiring teams or implements or machinery for or contributing to said work to be done, or * * * who supplies both work and materials, and whose claim has not been paid by the contractor, * * * or by the subcontractors," may file a claim with the officer or body by whom the contract was let or with the disbursing officer. Section 1 of the act requires an indemnity bond from the contractor inuring to the benefit of all such persons entitled to file claims under section two. The two bonding companies named herein as defendants were sued under these provisions of the act.

The appellants state two questions involved in their appeal—the application of the act to a rental of truck tires and tubes, and the alleged estoppel of respondent.

[1] The wording of the act is clear. It expressly includes the furnishing of supplies and the rental of "teams or implements or machinery." The appellants argue that whatever is furnished under the act must be entirely "used or consumed in the construction." But this could not be so in respect to the rental of teams, wagons, scrapers, etc. One who furnishes a wagon and a team is entitled to claim for the rental value of the wagon which would be classed as an "implement." One who furnishes a motor-driven truck may file for the gasoline used. Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 P. 702. Whether the tires used on the truck be classed as "implements" or "supplies," they are inseparably connected with the subcontract to haul for the contractor and would come under the express terms of the act. In accord with these principles are French v. Powell, 135 Cal. 636, 643, 68 P. 92; Bricker v. Rollins, 178 Cal. 347, 350, 173 P. 592; Ryan v. Shannahan, 209 Cal. 98, 103, 285 P. 1045; A. L. Young Mach. Co. v. Cupps, 213 Cal. 210, 214, 2 P.(2d) 321.

It is suggested in the brief, though not stated as a point involved in the appeal, that the contract price fixed for the rental of the supplies was in excess of the reasonable value. The trial court, on substantial and competent evidence, held to the contrary. The meager testimony which appellants cite as in conflict with this evidence was of doubtful competency and might have been rejected in its entirety. But the finding has ample support and is controlling.

[2, 3] The estoppel above mentioned is urged on the showing that, before the rental contract was executed, an employee of the respondent stated to an employee of the contractor that respondent might "take a chance" on the subcontractor's ability to pay. That respondent did not act on this suggestion is evidenced by the execution of the lease. Though the trial court's finding on this issue is also controlling, it may be noted that appellants made no proof that they changed their position or suffered any injury from any "declaration, act, or omission" of the respondent within the meaning of subdivision 3 of section 1962 of the Code of Civil Procedure. The burden of proof was on the appellants and, having failed in proof, they cannot complain of the adverse finding. Bashore v. Parker, 146 Cal. 525, 529, 80 P. 707; Regan v. Albin, 219 Cal. 357, 360, 26 P.(2d) 475.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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10 Cal.App.2d 41

In re PEW'S ESTATE.

DOBIE et al. v. KNOX.

Civ. 9882.

District Court of Appeal, First District, Division 2, California.

Nov. 6, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Wills 🔑552(1)

Rights of son of legatee who predeceased testatrix *held* to flow from statute, not through legatee's estate (Probate Code, § 92).

2. Wills 🔑552(1)

Court must read into will statute governing disposition of property where devisee or legatee dies before testator (Probate Code, § 92).

3. Wills 🔑552(6)

Under statute, son of legatee who predeceased testatrix *held* entitled to legacy, less amount of legatee's note to testatrix evidencing loans made to legatee by testatrix' deceased husband (Probate Code, § 92).

◆

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Clara Slocomb Pew, also known as Clara S. Pew, deceased. From a decree of distribution in favor of Booth Knox, the surviving son of one of the legatees, Clarence W. Dobie, as executor, and others appeal.

Decree in so far as appealed from reversed.

Olin L. Berry and Delbert L. Berry, both of San Francisco, for appellants.

Paul C. Dana and Francis B. Perry, both of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal by the executor from a decree of distribution.

In the decree appealed from the trial court ordered the bequest of $5,000 to Newton B. Knox be paid in full. The executor contends that there should have been deducted from said bequest the sum of $3,300 or thereabouts, the amount of a certain promissory note made by Newton B. Knox which evidenced loans theretofore made by John W. Pew, the husband of the testatrix.

In so far as any of its provisions are pertinent to the question before us the will provided as follows:

"I, Clara Slocomb Pew, of the City and County of San Francisco, State of California, being of sound mind and memory and not acting under duress, menace, fraud or undue influence of any person or persons whatsoever, do hereby make, publish and declare this my last will and testament in the manner following, that is to say:

"1. I hereby revoke all former wills made by me.

"2. I hereby direct that all my just bills be paid.

"3. I hereby give and bequeath unto my nephew Newton B. Knox at present residing in London, England, the sum of Five thousand ($5000) dollars. * * *

"6. I hereby give and bequeath unto Booth Knox of Palo Alto, California, now attending Stanford University, the sum of

Twenty-five hundred ($2500) dollars. * * *"

The record discloses that the testatrix was possessed of properties exceeding $400,000. By the terms of her will the testatrix made personal bequests to over twenty individuals in sums varying from $1,000 to $10,000. To certain charities she bequeathed $1,000 to each. The residue she bequeathed one-half to her sister and one-fourth to each of two nephews. Between the years 1927 and 1930, Newton B. Knox borrowed from John W. Pew, the deceased husband of the testatrix, certain sums of money and as evidence thereof made and delivered to Mr. Pew promissory notes. On May 3, 1930, Mr. Pew died. In the settlement of his estate the notes were appraised as of no value. On May 29, 1930, the testatrix made her will. On September 15, 1931, Newton B. Knox made and delivered to the testatrix a note in the sum of $3,182.95 and the earlier notes were delivered up and canceled. No part of the principal or interest on the note hereinabove last mentioned has been paid. The legacy to Booth Knox mentioned in paragraph 6 of the will was paid in full by the executor. Newton B. Knox died on May 15, 1932. The testatrix died December 25, 1933. In applying for a decree of distribution the executor asked the probate court to deduct from the legacy to Newton B. Knox the amount of the promissory note and direct a payment to Booth Knox of the balance only. To that request Booth Knox objected and asserted that he was entitled to be paid the full sum, $5,000. Probate Code, § 92. The trial court refused the request made by the executor and ordered the full sum of $5,000 provided in paragraph 3 of the will be paid to Booth Knox.

[1-3] The controversy between the parties presents a question that has never been decided by a court of appeal in this state. Other states have statutes similar to, but not identical with, section 92 of the Probate Code. In many of the states similar questions have arisen. The executor cites and relies on Baker v. Carpenter, 69 Ohio St. 15, 68 N. E. 577, and Denise's Executors v. Denise, 37 N. J. Eq. 163. On the other hand, the respondent cites and relies on Carson v. Carson's Executor, 1 Metc. (58 Ky.) 300; Succession of Morgan, 23 La. Ann. 290; Wattenbarger v. Payne, 162 Mo. App. 434, 145 S. W. 148; Wallace v. Du Bois, 65 Md. 153, 4 A. 402; Courtenay v. Courtenay, 138 Md. 204, 113 A. 717; and some other cases which he claims to be helpful arguendo. As pointed out by the Supreme Court of Iowa in the case entitled In re Mikkelsen's Estate, 202 Iowa, 842, 211 N. W. 254, the authorities are in hopeless conflict as to some factors entering into the controversy, although they are agreed on others. Whatever may be the rights of Booth Knox as the surviving son of Newton B. Knox, the authorities are agreed that his right flows from the statute (Probate Code, § 92) and not through the estate of his father. Again, if the written words of the will of Mrs. Pew were the sole statement of the subject-matter to be considered, Booth Knox would have no claim. But under settled law the court is bound to read into the will of Mrs. Pew section 92 of the Probate Code. That section is as follows: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will *in the same manner* as the devisee or legatee would have done had he survived the testator." (Italics ours.)

In the case of Baker v. Carpenter, 69 Ohio St. 15, at page 23, 68 N. E. 577, 579, the court said: "The plaintiffs in error in this case are not named in the will of Jacob W. Baker as legatees, nor anywhere designated in said will as beneficiaries, of the testator. They are mere 'statute made' legatees, who, by force of the provisions of section 5971, take the place of their father, and are given what, but for his death, would have gone to him as primary legatee under said will; and as such substituted legatees they must bear the burdens and be subject to the same equities that would have existed against him if he had survived the testator. In other words, in the language of the statute itself, they *'must take in the same manner as he would have done had he survived the testator.'*" (Italics ours.)

In the case of Denise's Executors v. Denise, 37 N. J. Eq. 163, at page 168, the court said: "The statute-made legatee is a mere substitute; he is thrust, by force of the statute, in the place made vacant by the death of the legatee named in the will, and is given what, but for his death, would have gone to the primary legatee. He takes the primary legatee's place, as a beneficiary under the will, and should, according to the ordinary rule prevailing in like cases, bear his burdens, and be subject to the equities which would have existed against him. The statute was designed simply to relieve from a hardship, and should not, by construction, be extended beyond the purpose of its enactment. It is in derogation of the right of testamentary disposition; it makes persons legatees not designated as such by the testator; it is true this is done on the theory which is probably correct in the great majority of instances—that if the testator had foreseen the condition of affairs actually existing at the time his will takes effect, he would have made the same persons legatees that the statute makes, but it is very obvious that such a statute should not be enlarged or extended by construction. Statutes must always be construed so as to give effect to the intent and object of the legislature, and this one, I think, must be so read as to cure the mischief it was intended to remedy; that is, it should be held to put the substituted legatee in the place of his parent, and to give him just what his parent would have been entitled to, subject to the same equities that his parent would have been subject to, and bound by the same rules of justice that his parent would have been bound by. He must *take in the same manner that his parent would have taken.*" (Italics ours.)

In the case of In re Mikkelsen's Estate, 202 Iowa, 842, 211 N. W. 254, the Supreme Court of Iowa noted the existence of the authorities on which this respondent relies and commented as follows: "We are of the opinion that these authorities give to the statute an effect which the testator, whose purpose should control, and who in most cases is wholly uneducated and uninformed concerning the technical rules and refinements in the laws regulating the testamentary disposition of property and the rules of descent, never intended." It then quoted at length from the Denise Case and the Baker Case and followed them. Later, in the case entitled In re Rueschenberg's Estate, 213 Iowa, 639, 239 N. W. 529, at page 531, the same court said: "It thus becomes apparent that the heirs of the predeceased son stand in no better position than would the son, had he survived his father, and that they can now take only what their father could have taken had he survived the testator. And since the bequests by the testator to the son could be applied upon the debts of the son to the testator, and which indebtedness is far in excess of the amount of the bequests, the heirs of the predeceased son are entitled to nothing out of the estate. The judgment of the trial court is correct, and the same is hereby affirmed." See the notes, 1 A. L. R. 1038, 30 A. L. R. 781, and 75 A. L. R. 888. See, also, 24 C. J. 487.

The cases entitled In re Hafner, 45 App. Div. 549, 61 N. Y. S. 565, and Jones v. Jones' Executor, 37 Ala. 646, were based on statutes materially different from our statute. Wattenbarger v. Payne, 162 Mo. App. 434, 145 S. W. 148, rests on a line of reasoning that would entirely ignore the presence in our statute of the last clause, "in the same manner as the devisee or legatee would have done had he survived the testator."

That portion of the decree appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

9 Cal.App.2d 753

BAGG v. WICKIZER.

Civ. 1574.

District Court of Appeal, Fourth District, California.

Nov. 4, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Justices of the peace 🔑4

Phrase "two years' actual practice of law" as commonly understood, and as used in statute governing justice's qualifications, means real and active performance of services in court or giving of legal advice and preparation of legal instruments by member of state bar duly licensed to practice; word "actual" meaning in fact or real (Code Civ. Proc. § 159a, as added by St. 1933, p. 1827).

[Ed. Note.—For other definitions of "Actual" and "Practice of Law," see Words & Phrases.]

2. Justices of the peace 🔑4

Evidence that clerk of justice's court was admitted to practice of law and, though maintaining no office, represented clients in court and before corporations commissioner and gave legal advice or prepared legal documents *held* to show that clerk was engaged in at least "two years' actual practice of law" within statute governing justice's qualifications, even though clerk did not pay business license under ordinance, and though statute prohibits clerks from practicing law (Code Civ. Proc. § 159a, as added by St. 1933, p. 1827; Pol. Code, § 4316).

3. Statutes ⚷217, 225

Statute being ambiguous, legislators' intention may be determined by comparing language therein with other laws on same subject, by public history, or by other legitimate means.

4. Statutes ⚷190

Statute being unambiguous, legislators' intention should be determined by language of statute itself.

5. Elections ⚷291

In election contest involving justice's office, contestant, alleging contestee's noncompliance with statute requiring two years' practice of law, had burden of proof (Code Civ. Proc. § 159a, as added by St. 1933, p. 1827).

◆

Appeal from Superior Court, San Bernardino County; G. K. Scovel, Judge.

Action by Charles Bagg against Russell A. Wickizer, to contest the election of the contestee to the office of justice of the peace. From a judgment for the contestant, the contestee appeals.

Reversed.

Fred A. Wilson, of San Bernardino, for appellant.

John L. Campbell, E. John Eriksson, and Ralph W. Eckhardt, all of San Bernardino, for respondent.

MARKS, Justice.

This is an action to contest the election of appellant to the office of justice of the peace of San Bernardino township, a class A justice's court. The election was held on November 6, 1934. The sole ground of contest is that appellant had not had "not less than two years actual practice of law in this State" prior to his election, or prior to his assuming the duties of his office, as required by section 159a of the Code of Civil Procedure, as added by St. 1933, c. 743, p. 1827.

Appellant had been clerk of the justice's court of San Bernardino township continuously for about seven years prior to his election. He was admitted to the practice of law on November 4, 1931, and since that time has been a member of the state bar in good standing.

[1-4] It is the theory of respondent that since section 4316 of the Political Code prohibits "clerks * * * from practicing law, or acting as attorneys or counselors at law * * * in the counties where they reside and hold office," appellant could not have had two years' actual practice of law in this state prior to his election. Appellant urges that the provisions of section 4316 of the Political Code, which we have quoted, applies exclusively to clerks of courts of record and not to clerks of justice's courts, or school boards, or other such persons. Without deciding this question, we will assume that the provisions apply to the clerk of the justice's court of San Bernardino township.

In addition to those already set forth, the record discloses the following undisputed facts: That appellant did not maintain a regular office for the practice of law; that he did not pay a business license tax to the city of San Bernardino for the privilege of conducting the business of the practice of law as required by an ordinance of that city; that he did not cause himself to be listed as an attorney at law in the telephone directory of San Bernardino nor in any directory of attorneys; that shortly after he was admitted to practice he caused business cards and stationery to be printed with his name thereon as an attorney at law with the address of his residence given; that he resided in an apartment house and had his card displayed on the door of the building and on the door of his apartment; that he interviewed clients at his apartment, at the offices of friendly attorneys, and at the office of the clerk of the justice's court when such interviews there did not interfere with his official duties; that clients engaged him to represent them in nineteen actions and proceedings and six probate proceedings in the superior courts of San Bernardino, Riverside, and Los Angeles counties, and in one justice's court action in Riverside county; that in some of these matters he appeared as the sole attorney of record, in others as the attorney of record associated with other attorneys, and that in the remainder other attorneys of his choosing appeared of record without his name appearing; that he appeared as attorney of record in two proceedings before the commissioner of corporations and secured permits for his clients to issue stock; that he gave legal advice to clients or prepared legal documents for them on not less than one hundred and twenty-six occasions.

The question of the definition of the term "practice of law" has been before the various courts of this country in many cases. In the case of State Bar of California v. Superior Court, 207 Cal. 323, at page 334, 278 P. 432, 437, it was said: "The term 'practice of law' has been defined in occasional cases, but perhaps as concrete and inclusive a definition as any is that contained in the case of Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836, wherein the court says: 'As the term is generally understood the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.'" See, also, Smallberg v. State Bar of California, 212 Cal. 113, 297 P. 916; People v. Merchants' Protective Corporation, 189 Cal. 531, 209 P. 363; People v. California Protective Corporation, 76 Cal. App. 354, 244 P. 1089; In re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 657; In re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198; L. Meisel & Co. v. National Jewelers' Board of Trade, 90 Misc. 19, 152 N. Y. S. 913; Matter of Pace, 170 App. Div. 818, 156 N. Y. S. 641; People v. People's Trust Co., 180 App. Div. 494, 167 N. Y. S. 767; In re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A. L. R. 1319; People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901. Webster defines actual as, "existing in act or reality; * * * in fact; real."

We conclude that the phrase "two years actual practice of law in this state," as commonly used and understood, means the real and active practice of law as defined in State Bar of California v. Superior Court, supra, and the other cited cases, by a person duly licensed to practice law and who is a member of the state bar. We think there can be no doubt that the evidence shows conclusively that appellant was engaged in the "actual practice of law in this state" for more than two years prior to his election as the phrase is thus defined.

The fact that he did not pay a business license to the city of San Bernardino cannot refute the positive evidence that he was actually practicing law. His neglect in this respect might have subjected him to civil suit or criminal prosecution, but we cannot conclude from that fact that he was not practicing law.

It remains for us to determine the meaning which the Legislature intended to place upon the phrase "not less than two years actual practice of law in this State," as used in section 159a of the Code of Civil Procedure. We have well-established and clearly defined rules of law to assist us in the construction of the phrase in question.

Where an ambiguity exists in the law, the intention of the legislators in passing it may be determined by comparing the language used with other laws on the same subject, by the public history of the time, or by other legitimate means. 23 Cal. Jur. 731. Where no ambiguity exists, the intention of the lawmakers must be determined by the language of the statute. In Ex parte Goodrich, 160 Cal. 410, 117 P. 451, 454, Ann. Cas. 1913A, 56, it is said: "But it still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words. 2 Lewis' Sutherland, Stat. Construction, § 388. It still remains true that even legislative debates are not appropriate sources of information from which to discover the meaning of the language of the statute. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007; American Net & Twine Co. v. Worthington, 141 U. S. 468, 12 S. Ct. 55, 35 L. Ed. 821. And it still remains true that even the testimony or opinions of individual members of the legislative body are not admissible for the purpose of showing what in fact was intended or meant by an act. State v. Burk, 88 Iowa, 661, 56 N. W. 180; Richmond v. Supervisors, 83 Va. 204, 2 S. E. 26; People v. Smith, 78 Hun, 179, 28 N. Y. S. 912." In People v. Stanley, 193 Cal. 428, 225 P. 1, 2, the Supreme Court said: "It is a cardinal rule, applicable to the interpretation of statutes, that, in order to ascertain the intent of the Legislature in enacting the same, recourse must first be had to the language of the statute itself, and that if the words of the enactment, given their ordinary and proper signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Sharon v. Sharon, 75 Cal. 1–28, 16 P. 345; Merkley v. Williams, 3 Cal. App. 268, 84 P. 1015; King v. Armstrong, 9 Cal. App. 368, 99 P. 527; Sacramento County v. Glann, 14 Cal. App. 780, 113 P. 360; Smith v. Union Oil Co., 166 Cal. 217, 135 P. 966." "This must be done even though it appear probable that a different object was in the mind of the Legislature." Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702, 704.

As there appears to be no ambiguity or uncertainty in the phrase contained in section 159a of the Code of Civil Procedure, which we are considering, when giving to the words used their ordinary and popular meaning, we must conclude that the phrase "actual practice of law" must be given the meaning ascribed to it by Webster and the case of State Bar of California v. Superior Court, supra.

In order to sustain the contention of respondent that appellant, while engaged in the active practice of law, could not qualify for his present office because such practice was contrary to law, we would have to interpolate into the provisions of section 159a of the Code of Civil Procedure language that does not appear in that enactment. This we cannot do. As the language of the section presents a meaning clear and free from ambiguity, we must construe and apply it as we find it. We cannot escape the conclusion that appellant "had not less than two years actual practice of law in this state" prior to his election. He is therefore qualified to hold the office of justice of the peace of San Bernardino township.

Respondent maintains that as section 4316 of the Political Code prohibits clerks from practicing law in the counties in which they hold office or reside, appellant was prohibited from practicing law in San Bernardino county and cannot be held to have been engaged in the lawful practice of the law.

If we assume, as we have done, that the provisions of section 4316 of the Political Code include within its prohibitory terms clerks of class A justice's courts, then we must conclude that as appellant was practicing law in San Bernardino county, he was violating the terms of this statute. This might or might not have subjected him to disciplinary action at the hands of the proper authorities had proceedings been instituted. The very gravamen of any charge against him would necessarily have been that he was engaged in the practice of law and in so doing was violating some rule of conduct. If he were not practicing law, he could not have been violating the provisions of section 4316 of the Political Code.

What we have just said is by way of argument only and must not be construed as a holding that appellant has been guilty of the illegal practice of law or that his practice of law while clerk of the justice's court rendered him open to censure. We have only assumed, without holding, that section 4316 of the Political Code applies to clerks of class A justice's courts. There are serious arguments to be advanced on both sides of this question and we would not express an opinion upon it without careful study.

[5] Respondent cites a finding of the trial court that only in one instance did appellant collect fees for his services as attorney at law while clerk of the justice's court. He urges that the receipt of compensation for services is one of the usual and ordinary incidents of the practice of law and that this lack of fees collected shows that appellant was not actually practicing law. This finding is without evidentiary support. During the course of his testimony, appellant was not once asked whether he collected fees for his services. In two instances he volunteered the information that he had received fees for two proceedings in the superior court. It was respondent who alleged that appellant had not been engaged in the active practice of law for two years. The burden of proving this allegation rested upon him. His failure to produce any evidence on the question of the collection of fees by appellant from the large majority of his clients does not support the conclusion that no fees were collected by him.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

SNYDER v. TANNER MOTOR LIVERY, Limited, et al.

Civ. 10572.

District Court of Appeal, Second District, Division 2, California.

Nov. 8, 1935.

Rehearing Denied Dec. 3, 1935.
Hearing Granted by Supreme Court Jan. 6, 1936.

1. **Carriers 🔑316(1)**

Where passenger for hire is injured in automobile accident, which ordinarily would not occur if reasonable care were exercised, proof of circumstances of accident and exclusive control of automobile by carrier raises presumption of negligence.

2. **Carriers 🔑320(15)**

In action by passenger for hire for injuries sustained in automobile accident occurring when driver swerved from road to avoid crashing into rear of truck, whether passenger was guilty of contributory negligence *held* for jury.

3. **Carriers 🔑321(21)**

In action by passenger for hire for injuries sustained when automobile in good mechanical condition ran off paved highway, instruction upon doctrine of res ipsa loquitur *held* proper.

4. **Damages 🔑132(3)**

$25,000 for injuries to man, 39 years of age, earning $100 per week, which included severance of certain facial nerves, resulting in permanent partial facial paralysis with partial loss of power of expression, impairment of speech and hearing, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Arthur J. Snyder against the Tanner Motor Livery, Limited, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Wm. K. Young, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff was a passenger for hire in an automobile owned by the corporate defendant, a common carrier, and driven by its employee, defendant Stewart. Blinded by glaring headlights of an approaching car, Stewart did not observe that he was about to crash into the rear of a truck upon the highway in front of him until it was too late to apply his brakes effectively. To avoid a collision he swerved from the road into a vineyard, and plaintiff was thrown against the window of the car, breaking the glass and receiving severe facial and head lacerations for which damages of $25,000 were awarded by the trial court. Both defendants appeal, and the matter reaches this court upon respondent's motion to dismiss the appeal or affirm the judgment.

[1, 2] In this case the evidence is without substantial dispute. Appellants' only witness, the driver of the automobile, gave testimony in conformity with that offered by respondent, leaving in effect no controversy as to the facts. Respondent was a passenger for hire in a public conveyance. Where an accident occurs in such a case and the passenger is injured, which ordinarily would not occur if reasonable care were exercised, proof of the circumstances of the accident and the exclusive control of the car by the defendants raises a presumption of negligence, and such a presumption is evidence, as is stated by the court in Davis v. Brown, 92 Cal. App. 20, 267 P. 754. It is claimed that respondent was guilty of contributory negligence. But even if he did see the truck in front of the automobile or if he believed the automobile in which he was riding was traveling at an excessive rate of speed, it cannot be said as a matter of law that under the circumstances of this case respondent was under any duty to interfere with the operation of the public conveyance in which he was a passenger for hire. Dowd v. Atlas Taxicab & Auto Service Co., 187 Cal. 523, 202 P. 870. There is no substantial evidence that respondent was guilty of negligence, but the matter was left to the determination of the jury under appropriate instructions whether plaintiff's actions under the circumstances were such as to absolve him from any charge of contributory negligence.

[3] Appellants complain that it was erroneous for the court to instruct the jury upon the doctrine of res ipsa loquitur. Where, as in this instance, a public conveyance in good mechanical condition and moving upon a paved highway swerves from the road and runs off into the bordering terrain, the doctrine referred to applies (Lawrence v. Pickwick Stages, 68 Cal. App. 494, 229 P. 885), and the trial

court's instruction as given was without error. Bezera v. Associated Oil Co., 117 Cal. App. 139, 3 P.(2d) 622.

[4] It is urged that the damages awarded are excessive. At the time of the accident respondent was 39 years of age, earning not less than $100 a week. His injuries, in addition to the numerous flesh lacerations, included the severance of certain facial nerves, resulting in permanent partial facial paralysis, with partial loss of power of expression, impairment of speech and hearing. This matter was addressed to the sound discretion of the jury under appropriate instructions, and there is no suggestion that the fact finders were moved by passion or prejudice in arriving at their estimate of the damages suffered.

Other points are argued by appellants, but we regard them as of minor importance and without merit. The case was fairly tried, the jury fully instructed, and we find no error in the record.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

On Hearing in Supreme Court.

PER CURIAM.

Appellant's petition to have the above entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the Second Appellate District, Division Two, is granted, and said cause transferred to this court for hearing and decision. However, upon suggestion of counsel for appellant, it appears that the litigation herein has been settled and the cause become moot. Hence, said appeal may be and it is hereby dismissed.

WASTE, C. J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.

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9 Cal.App.2d 643

PEOPLE v. HARLOW.

Cr. 2768.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

Hearing Denied by Supreme Court Nov. 29, 1935.

1. Divorce 🔑62(1)

Domicile is necessary to give court jurisdiction in action for divorce.

2. Divorce 🔑327

Mexican divorce obtained by husband who had not been in Mexico in connection with action, from wife who was served with documents which were written in Spanish and which she did not know meaning of and who did not file any pleading or make any appearance in Mexican court, was nullity for failure of Mexican court to acquire jurisdiction of marriage status or of parties (Code Civ. Proc. §§ 1915, 1917).

3. Judgment 🔑818(1)

Existence of jurisdiction can be inquired into in connection with judgment of foreign court offered in California courts.

4. Indictment and information 🔑111(1)

Defendant who remarried after obtaining invalid Mexican mail order divorce from former wife *held* guilty of bigamy, notwithstanding that information did not deny existence of circumstances under which marriage of person having living spouse would not be bigamy (Pen. Code, § 282).

5. Indictment and information 🔑111(1)

Information charging bigamy need not deny existence of circumstances under which marriage of person having living spouse does not constitute bigamy (Pen. Code, § 282).

◆

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Dow L. Harlow was convicted of bigamy, and he appeals.

Affirmed.

Henry E. Phister, Walter E. Barry, and Thomas J. Dunnigan, Jr., all of Los Angeles (F. Walter French, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

The principal question presented by appellant on his appeal from a judgment of conviction of bigamy is the validity of his so-called Mexican "mail order" divorce from a former wife. He also appeals from an order denying a new trial.

Ollie V. Harlow, the complaining witness, married appellant in Indiana in 1913. They came to California shortly afterwards, and Mrs. Harlow bought a home in San Diego the following year. For all of the time thereafter until 1933, they lived in San Diego for three or four months of each year, residing the rest of the time in Oklahoma.

In the year 1933, Ollie V. Harlow and appellant lived in San Diego during the months of July, August, and September. They then returned to Oklahoma, but appellant left his wife within two or three days after their arrival in Tulsa. According to her testimony, appellant left her to go to Los Angeles and open an oil office. She was to join him in Los Angeles later. She heard from him by letter until December of that year, at which time she came to Los Angeles of her own volition. She did not hear from her husband further and did not see him until the following July, which was after the marriage for which appellant was convicted.

In the meantime appellant lived in Los Angeles, where, early in 1934, he consulted a lawyer licensed to practice in the state of Chihuahua, Mexico, but not licensed to practice in California. The record shows that appellant stated to this lawyer his desire to get a divorce. The lawyer prepared a power of attorney which authorized one Cuen, an attorney in Mexico, to submit appellant's divorce action to the courts of Mexico. Thereupon Cuen filed an action in Mexico in the name of appellant for a divorce from Ollie V. Harlow. The complaint recited, among other things, that "considering the plaintiff that the matrimonial life could not be carried on by any motive or in any way, he sees himself in the necessity of requesting through me the dissolution of the civil contract before expressed, submitting himself expressly to the jurisdiction of that court under your charge."

After certain proceedings, the court of first instance of civil law of Bravos district, state of Chihuahua, Mexico, on June 15, 1934, rendered a decree of divorce purporting to dissolve the marriage existing between appellant and Ollie V. Harlow. On July 5, 1934, appellant entered into a duly solemnized marriage contract in California with Alma Z. Lacey, for which he has been convicted of bigamy.

It is admitted that appellant was never in Mexico, except for one or two days; and that he was never in the state of Chihuahua in connection with his divorce action. The evidence also shows that Ollie V. Harlow was twice served with documents written entirely in the Spanish language, but that she did not know their contents. She never filed any pleading nor made any appearance in the Mexican court, nor was she ever in Mexico.

"It is universally conceded that a divorce proceeding, in so far as it affects the status of the parties, is an action in rem. * * * It is usually said that the 'marriage status' is the res. Both parties to the marriage, and the state of the residence of each party to the marriage, has an interest in the marriage status. In order that any court may obtain jurisdiction over an action for divorce that court must in some way get jurisdiction over the res (the marriage status)." Delanoy v. Delanoy, 216 Cal. 27, 32, 13 P.(2d) 719, 720, 86 A. L. R. 1321. From the facts shown in the case at bar, it is apparent that the courts of the republic of Mexico never acquired any jurisdiction of the marriage status nor of the parties.

[1-4] Domicile is necessary to give a court jurisdiction in an action for divorce. This general rule has been followed in numerous cases, one of the latest being Ryder v. Ryder, 2 Cal. App. (2d) 426, 37 P.(2d) 1069. It has also been stated by the American Law Institute in its Restatement of Conflict of Laws, as follows: "A state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state." Paragraph 117. The purported decree of divorce secured by appellant is therefore a nullity because of lack of jurisdiction, the existence of jurisdiction being always a proper subject of inquiry in connection with any judgment of a foreign court offered in the courts of our own state.

Appellant seeks judicial approval of his Mexican decree by the courts of California under the provisions of section 1915 of the Code of Civil Procedure. But this section expressly limits its application to final judgments of courts having jurisdiction. And by section 1917 of the Code of Civil Procedure such jurisdiction must be "over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment." To hold that the courts of Mexico ever acquired jurisdiction to render the decree presented by appellant would be a travesty on justice.

Appellant complains of a failure of proof of the first marriage. Without reciting the evidence in detail, we may say that it more than measures up to that in the case of Budd v. Morgan, 187 Cal. 741, 203 P. 754, which was held to be sufficient.

[5] Appellant also contends that because the information did not negative the exceptions mentioned in section 282 of the Penal Code, it failed to state a public offense. However, in People v. Priestley, 17 Cal. App. 171, 118 P. 965, it was held that an information charging bigamy need not negative those exceptions.

The judgment is affirmed; the order is affirmed.

We concur: HOUSER, P. J.; YORK, J.

9 Cal.App.2d 573

CALIFORNIA STANDARD FINANCE CORPORATION v. CORNELIUS COLE, Limited, et al.

Civ. 9035.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1935.

1. Guaranty 🔑91

In payee's action against guarantor of note, evidence *held* to show that maker was not payee's agent in procuring guarantor's signature, and that payee was not responsible for misrepresentations made by maker to guarantor.

2. Bills and notes 🔑92(3), 94(1)

Pre-existing debt and forbearance to sue thereon constituted sufficient consideration for guarantor's signature as accommodation indorser (Civ. Code, §§ 2792, 3106).

3. Contracts 🔑98

Contract obtained by menace or duress is voidable and not void, and defense on such ground is personal to the one whose free consent was taken away by such means (Civ. Code, § 1566).

4. Guaranty 🔑78(1)

Guarantor of note being sued by payee could not avail herself of defense that corporate maker executed note under menace and threat of duress where maker waived such defense by default, president of maker testified that maker's consent was not obtained by menace, and maker did not question genuineness of note.

5. Guaranty 🔑78(1)

Guarantor of note could not avail herself of defense that note was executed as part of agreement by which payee was to take over management of maker's business, and that payee diverted money which should have been applied to payment of note, where guarantor was not informed of such arrangement when her signature was procured, maker did not offer such defense, and jury impliedly found that no such agreement was made.

6. Guaranty 🔑91

In payee's action against guarantor of note, evidence *held* insufficient to sustain guarantor's defense that payee took over maker's business and diverted money which should have been applied to payment of note.

◆

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by the California Standard Finance Corporation against Cornelius Cole, Limited, Doris Kenyon Sills, and others. From a judgment in favor of Doris Kenyon Sills against the plaintiff, the plaintiff appeals.

Reversed.

See, also, 132 Cal. App. 105, 22 P.(2d) 520.

Ellis I. Hirschfeld, Samuel W. Blum, and Clyde C. Shoemaker, all of Los Angeles, for appellant.

William E. Reiley, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff appeals from a judgment against it in an action brought by it upon a promissory note. The record shows that the note was made by Cornelius Cole, Limited, a corporation, in favor of plaintiff, and was guaranteed by Cornelius Cole, Edwin Carewe, and Doris Kenyon Sills. Plaintiff had judgment against the corporation and Cole upon their default. On trial of the action against the other defendants, a jury returned a verdict in favor of plaintiff against Carewe, and in favor of Mrs. Sills against the plaintiff.

Appellant's first point on appeal concerns the sufficiency of respondent's answer. This answer presents what the pleader evidently intended to be denials of the allegations of plaintiff's complaint, followed by six separate affirmative defenses. In the first of these defenses, respondent alleges upon information and belief that at the time of the execution of the note its maker owed the payee $10,000; that the payee knew that the business was insolvent and could not pay the amount of the indebtedness, or the note; that it therefore "engaged and induced Cornelius Cole, who was at that time president of Cornelius Cole, Ltd., a corporation, to act for plaintiff and to be plaintiff's agent in obtaining the signature of defendant, Doris Kenyon Sills, to the guaranty" sued on. She then alleges that Cole, "so engaged and induced by plaintiff, and then and there acting as agent for plaintiff secured this defendant's signature to said guaranty" by misrepresenting the nature of the instrument. She also alleges that at the time her signature was secured by Cole he "so covered up and concealed the writing of said guaranty and rushed this defendant into signing the same, that this defendant had no knowledge that she was signing a guaranty or any instrument other than a statement as to the good character and integrity of the said Cornelius Cole"; that she was recovering from shock and nervous breakdown following the death of her husband; and that the appellant accepted the guaranty knowing the misrepresentations which had been made to her. Following these allegations, respondent alleges the untruth of the representations, her reliance upon them, and that she would not have signed the guaranty had she known the true nature of the instrument or the financial condition of the maker of the note.

The second affirmative defense alleges that the note guaranteed by the respondent was given by the maker without consideration for a pre-existing debt; and that respondent received no consideration therefor. The next defense alleges that appellant in accepting the note did not cancel or surrender certain security it had, and did not thereafter pursue its rights thereunder. In the fourth defense respondent alleges that the note was executed by Cole under "menace and threats of duress," in that he was told "that unless he executed said note on behalf of the defendant company and secured two guarantors acceptable to plaintiff on said note, that he would be prosecuted for a criminal offense." For a further defense respondent again alleges most of the charges previously pleaded, and that appellant knew, before receiving the note signed by respondent as guarantor, that Cole had previously attempted to secure other persons as guarantors and had misrepresented the facts to them. The final defense urged is that appellant, as part of the transaction in which the note was given, took over the business of the Cole corporation and collected money belonging to it which should have been applied as payment on the note, but which was diverted to other purposes.

The fact that the answer does not present any properly pleaded denials of the allegations of appellant's complaint, nor does it state a cause of defense is of secondary importance because the record shows the evidence to be insufficient to support the verdict in respondent's behalf if the denials and the affirmative defenses were properly pleaded. Although the record is voluminous, the facts concerning respondent's connection with the transaction are few and stand practically undisputed.

[1] It appears that at the time the note was given the Cole corporation was a dealer in Ford automobiles and that it owed appellant approximately $10,000; that this money had been borrowed for the purpose of "flooring" cars bought from the manufacturer; that this amount was borrowed under an agreement by which the Cole company obligated itself to repay a portion of the indebtedness whenever a car was sold; and that seventeen automobiles had been sold without accounting to the appellant for the amounts payable therefor. The record suggests that this situation came about either through bad bookkeeping or misuse of funds by an employee of the Cole company. In any event, when Cole knew of the situation, he realized that his company was in desperate financial shape and he went to appellant to ascertain under what circumstances payment of the indebtedness could be deferred. He was told that the note of his company with two indorsers satisfactory to the appellant would be accepted in satisfaction of the existing indebtedness, but that if he was unable to deliver such a note, his business would be closed up.

Appellant drew the note for $10,000 and gave it to Cole for the purpose of securing the signatures of the indorsers. Thereafter Cole went to respondent and at his request she executed the guaranty. Assuming that the representations which respondent testified Cole made to her at the time would be sufficient to avoid the contract as between them, there is not the slightest evidence to show that Cole was the agent of appellant. All of the evidence is to the contrary. No person connected with the appellant made any representations to respondent. She was a friend of Cole and he suggested her name to appellant as a person whom he would secure to guarantee the note. There is nothing to show that Cole ever told appellant how he secured the signature of respondent to the guaranty, or that it knew anything about the reasons which may have actuated her to sign it.

Cole presented the note to appellant with respondent's signature as a guarantor. It accepted the note and on the same day wrote Mrs. Sills a letter reading as follows: "This is to advise you that we have this day accepted a promissory note dated November 8th, 1930 and due May 8th, 1931, in the amount of $10,000.00. This note is signed by Cornelius Cole, Ltd., by Cornelius Cole, President, and is indorsed by the following: Edwin Carewe, yourself, Cornelius Cole." Nothing was heard from her until after the note became due and efforts were made by appellant to collect it. The evidence conclusively shows that Cole was not the agent of appellant in securing the signature of Mrs. Sills, and that it is not responsible for any representations made to her by him.

"While the law requires the guarantee to act in good faith, unless he has knowledge of or participates therein, he is not responsible for any misrepresentation or deception practiced by the principal, or other third person, upon the guarantor in order to induce him to enter into the contract of guaranty." 28 C. J. 927; Elizalde v. Murphy, 163 Cal. 681, 126 P. 978. See, also, the authorities reviewed in a note to Sager v. W. T. Raleigh Co., 66 A. L. R. 305.

[2] Concerning the second affirmative defense, the pre-existing debt and the forbearance of appellant to sue constituted sufficient consideration for the respondent's signature as an accommodation indorser. Sections 2792, 3106, Civ. Code; Stavnow v. Winfree, 99 Cal. App. 566, 278 P. 905; Bridge v. Ruggles, 202 Cal. 326, 260 P. 553.

No evidence was offered in support of the third affirmative defense.

[3, 4] The defense that the note was executed by Cole by menace and duress is not supported by either the law or the facts of this case. A contract obtained by menace or duress is voidable, and not void (section 1566, Civ. Code), and a defense upon this ground is personal to the one whose free consent was taken away by such means. "With respect to the right of a guarantor to avail himself of duress brought to bear upon the principal debtor, the general principle is that only he to whom duress is offered can take advantage of it." 28 C. J. 925. By the default of the corporation and of Cole, each of them waived the defense of menace and duress. Bridge v. Ruggles, supra. And it is to be noted that Cole testified that he would have signed the note had there been no discussion of criminal prosecution. Upon his own testimony, therefore, his consent to the contract was not obtained by menace. Section 1566, Civ. Code. It may be mentioned also that neither Cole nor the corporation questioned the genuineness of the note, and the corporation paid a small portion of the principal in addition to regular installments of interest as they accrued, until it failed.

The charge of the fifth defense that Cole, with the knowledge of appellant, attempted to secure other guarantors to the note by misrepresentation of the facts to them, has no evidence whatever to support it.

The final defense is that appellant took over the business of the corporation and diverted money which should have been applied to the payment of the note to other purposes. This may properly be considered in connection with affirmative allegations made with the denials of the answer that the note was given as part of an agreement by which appellant was to take over the management of the Cole company and pay the note from the profits of the business.

[5] The defendant Carewe, called as a witness in his own behalf, and Cole, called as a witness in behalf of Carewe, each testified that at the time the making of the note and the guaranty was discussed by them with Mr. Coffman of the finance company, the latter told them that his company would put a manager in the business and that it would pay the note from the profits of the business. Mrs. Sills was not present at this conversation and no mention of such an arrangement was made to her by Cole when he procured her signature to the note. The testimony of Cole and Carewe was offered on behalf of the latter. Neither Cole nor the corporation ever offered any defense to the action upon this ground. And as the verdict of the jury was in favor of the finance company against Carewe, its implied finding was that the agreement which Cole and Carewe testified to and had not been made. The verdict in favor of respondent cannot, therefore, be supported on this ground.

[6] Respondent's charge that appellant took over the business of the Cole company and diverted money which should have been applied to the payment of the note is also without evidentiary foundation. After the note was executed, one of appellant's employees, who was familiar with the financial part of the automobile business, assisted Cole for some weeks in his attempts to put the business on a paying basis. As a convenience, Cole gave him authority to countersign checks, two signatures being always required. Appel-

lant paid this person's salary during all the time he was at the Cole company's place of business, and the evidence shows that he assumed no authority whatever. His duties seem to have been advisory only. The money of the corporation was either paid out by Cole's direction or in payment of bills in routine manner. Apparently the appellant thought that Cole's difficulties were, at least in part, the result of inefficient management and it was willing to loan him a capable person as a business adviser in his efforts to rehabilitate the business. There are no facts shown which would form any basis for the exoneration of the guarantor.

These conclusions make it unnecessary to discuss the other questions presented.

The judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 714

In re CARTER'S ESTATE.

KATZ v. CARTER.

Civ. 9966.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1935.

Hearing Denied by Supreme Court Jan. 2, 1936.

1. Executors and administrators 🔑32(1)

Public administrator not being mentioned in statute relating to revocation of letters of administration, proceedings by deceased's brother to revoke letters issued to public administrator could not be taken under such statute (Probate Code, § 452).

2. Executors and administrators 🔑32(1)

No person in any preferred class mentioned in statute governing revocation of letters of administration may assert his prior rights thereunder if original letters have been issued to person within any of statutory classes (Probate Code, § 450).

3. Executors and administrators 🔑32(1)

Under statute, letters of administration granted to public administrator may not be revoked merely on petition of deceased's brother or other person asserting prior right, in absence of statutory showing of cause, since court could not say that words "public administrator" were inadvertently included in statute (Probate Code, §§ 450, 521 et seq.).

4. Statutes 🔑181(1)

Court must seek interpretation of statute which will convey Legislature's intention.

5. Constitutional law 🔑70(3)

Court cannot ignore plain and unambiguous language of statute merely because not agreeing that statute is wise or beneficial.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of C. S. Carter, also called Charles S. Carter, also called Calil Carter, deceased. From an order revoking letters of administration issued to Phil C. Katz, public administrator, and an order granting letters to John Carter, a brother of the deceased, the public administrator appeals.

Reversed.

Henry F. Boyen, of San Francisco (Frank J. Fontes, of San Francisco, of counsel), for appellant.

Reed M. Clarke and William Klein, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

On January 3, 1935, the public administrator in the city and county of San Francisco was duly appointed administrator of the estate of C. S. Carter, who died on the 14th of December preceding, leaving four brothers and one sister, all then nonresidents of this state. On the following day John Carter, a brother of the deceased, filed a petition in which he stated that he was a resident of the city and county of San Francisco and asked for the revocation of the letters originally issued and for the granting of letters to him. This petition was heard before the same court and over the objection of the public administrator that the court was without jurisdiction to proceed in the matter; that the claim of John Carter to residence in San Francisco was feigned for the sole purpose of obtaining the letters and that he had waived his right to letters by permitting the public administrator to obtain the original letters upon his assurance that he was at that time a resident of the state of Massachusetts; that he had actual knowledge of the filing of the original petition and the hearing thereon; and that he failed to object to or oppose the original petition.

The evidence taken upon the hearing of the Carter petition was confined almost entirely to the question of his residence. The evidence presented by the public administrator showed unmistakably that John Carter had lived in the state of Massachusetts for more than twenty-five years where he maintained a family, consisting of a wife and three children; that he was a shoe cutter by trade; that he came to San Francisco upon notice of the death of his brother and at that time executed an affidavit in which he stated that he was a resident of Massachusetts and had never been a resident of the state of California. Pending the hearing of the petition of the public administrator, John Carter stayed in San Francisco and then learned that the deceased owned some furniture in a hotel which he was operating under a lease and he at that time reached the determination that if he could get the management of this hotel he would remain in San Francisco and make that place his residence. The trial court revoked the original letters and granted letters to John Carter reciting that he "is entitled to letters of administration." No other recital or finding was made as to the bona fides of this claim of residence, and the only basis for a claim of conflict with the evidence heretofore recited is that John Carter testified on the stand that he intended to make San Francisco his future home. The public administrator has appealed from the order revoking his letters and from the order granting letters to John Carter.

Though the evidence upon the question of residence would have fully justified a denial of both petitions, we refrain from deciding whether it is insufficient to support the order because the question of jurisdiction which was raised at the outset of the hearing requires a reversal without regard to any other questions raised. The point of the appellant is that, under the provisions of sections 450 and 452 of the Probate Code, when letters of administration have been granted to a public administrator, they may not be revoked merely on the petition of one who asserts a prior right and without a showing of cause therefor under sections 521 et seq. of the Probate Code. The question is a new one, and we have not been able to find any authorities dealing with it.

With the adoption of the Probate Code in 1931, section 450, based on section 1383 of the Code of Civil Procedure, was enacted to read: *"Prior claimants for letters.* When letters of administration have been granted to any person *other than* the surviving spouse, child, parent, brother or sister of the intestate *or the public administrator,* any one of them who is competent *and had a prior right to letters,* or any competent person at the written request of any one of them who is competent and had such prior right, may obtain the revocation of the letters, and be entitled to the administration, by filing a petition praying the revocation, and that letters of administration issue to him." (Italics ours.)

[1] It should be noted that only two changes of significance were made in the language of 1383 when it was copied into the Probate Code: First, the addition of the words "or the public administrator"; and, second, the addition of the words "and had a prior right to letters." Section 452 as copied into the Code is, except for immaterial changes, the same as former section 1386 of the Code of Civil Procedure. The public administrator is not mentioned in section 452; hence these proceedings cannot be taken under that section. All the cases touching upon section 1383 and 1386 apply the doctrine of strict interpretation to the language used. Estate of Martin, 163 Cal. 440, 445, 125 P. 1055; Estate of Mintaberry, 183 Cal. 566, 568, 191 P. 909.

[2] The rule is settled beyond controversy that no person in any of the preferred classes mentioned in section 1383 could assert his prior rights under that section if original letters had been issued to any person within any one of the classes specifically mentioned in that section. Estate of Shiels, 120 Cal. 347, 349, 52 P. 808; Estate of Aldrich, 147 Cal. 343, 345, 81 P. 1011, 1012. Since its adoption, that section has been held to apply only in cases where original letters have been issued to one "other than" those specifically mentioned in that section. With like uniformity the rights of these parties under these circumstances have been held to rest in section 1386 to the extent that they were specifically mentioned in that section. Long before the enactment of the Probate Code, the Supreme Court, in Estate of Aldrich, supra, followed the interpretation of section 1383 with an illustration of its meaning in this language: "It refers to a case where letters have been granted to one not claiming, or having been adjudicated, to be one of the persons mentioned in section

1383, as, for instance, where the public administrator, or a creditor, or some other person legally competent, but not enumerated in said section, has been appointed."

[3-5] Hence, when the Legislature, with full knowledge of the application which had been made of the language of section 1383, copied that section into the Probate Code almost verbatim and then added the words, "or the public administrator," no court can say that the Legislature did not intend to include the public administrator in the classes theretofore specified in the Code section. Cases are legion holding that we must seek an interpretation of a statute which will convey the intention of the Legislature, but the rule is equally well settled that we cannot ignore the plain and unambiguous language used by the Legislature merely because we do not agree that the statute as written is wise or beneficial legislation. As said in Estate of Mintaberry, supra, 183 Cal. 566, at page 568, 191 P. 909, 910, "the whole matter of representation of the estate is one of statutory regulation, and the Legislature has a wide discretion in determining the conditions to be imposed."

The historical background of this legislation may add some light upon the question of the intention of the Legislature. It is a matter of common knowledge that long prior to the enactment of the Probate Code there was agitation for changes in the legislation which permitted the public administrators to collect and retain for their own use all the statutory fees payable in the administration of these estates. This agitation had brought about changes prior to the enactment of the Probate Code through which all statutory fees collected by the public administrators in the three largest counties of the state are paid to the county for public use and the public administrators therein are paid a fixed salary for their services. The effect of these statutory changes has made the largest counties of the state the beneficiaries of those statutes which favor the public administrator in the matter of administration fees. For these reasons it is just as probable that the Legislature deliberately intended to put the public administrator in the preferred class with the rights and privileges heretofore noted as it is to assume that the language referred to crept into the section inadvertently. But as we have said before we must take the statute as it has been written, though we may find no good reason for its enactment. Under the plain terms of sections 450 and 452 the probate court was without power or jurisdiction to revoke the letters granted to the appellant for the reasons stated in respondent's petition.

The orders are reversed.

We concur: STURTEVANT, J.; SPENCE, J.

9 Cal.App.2d 637

HANDY v. FITSCHEN.

Civ. 9444.

District Court of Appeal, Second District, Division 1, California.
Nov. 1, 1935.

Hearing Denied by Supreme Court
Dec. 30, 1935.

1. Landlord and tenant 🔑213(1)

Tenant, by delivering rentals to sheriff pursuant to writs of attachment issued in action against lessor, *held* not to have discharged his liability for payment thereof to party purchasing property subject to lease, where tenant had received notice that property had been transferred to purchaser and that he was to pay rent to him.

2. Landlord and tenant 🔑213(1)

That landlord's conveyance of rented premises may have been without consideration and for purpose of defrauding creditors *held* not to excuse tenant notified of conveyance of liability to grantee for rentals which he had thereafter paid to sheriff on attachments issued in action against landlord.

3. Appeal and error 🔑882(3)

Where action by purchaser of premises against tenant to recover rentals which tenant had paid sheriff on attachments issued in action against prior owner had been tried on theory that conveyance had actually been made, District Court of Appeal would not consider contentions made for first time that proof of conveyance was wholly lacking.

◆

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Sidney Handy against Albert C. Fitschen. Judgment for plaintiff, and defendant appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

E. O. Leake and J. J. Leake, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment in an action in unlawful detainer. Prior to December, 1932, Harriett Morrow leased the premises to defendant, a month to month tenancy, for $250 per month. Prior to December 20, 1932, Harriett Morrow was named as one of the defendants in an action filed in San Bernardino county, Cal., in which action writs of attachment were issued and delivered to the sheriff of Los Angeles county. The sheriff levied on the rentals payable by defendant to Harriett Morrow on December 20, 1932, and January 20, 1933, which rentals were delivered by defendant to the sheriff. In like manner the sheriff levied on the rentals due on the 20th of February, March, and April, 1933, and in like manner the money was delivered by defendant to the sheriff.

It is alleged in the complaint that, "prior to the 20th day of February, 1933, said property was conveyed by grant deed by Morrow to plaintiff subject to said month to month lease to defendant; that plaintiff is now the legal owner of said property." This allegation is denied in the answer.

[1, 2] The answer sets up two affirmative defenses: (1) That the rentals had been delivered to the sheriff pursuant to writs of attachment and, by reason thereof, defendant had satisfied and discharged his liability for the payment thereof to plaintiff. (2) That the conveyance by Harriett Morrow to plaintiff was without consideration and for the purpose of defrauding creditors.

Of the two grounds for appeal presented herein, one is based on the trial court's refusal to recognize these two special defenses as valid. The court properly sustained objections to the evidence offered in support thereof.

The only evidence adduced at the trial was the testimony of defendant, which was brief. In his testimony, called as a witness by plaintiff, appears the following:

"Q. And on or about the 14th or 15th day of February, 1933, you received a notice that the property had been transferred to Sidney Handy? A. Yes, sir. * * *

"Q. On or about the 15th day of February, 1933, you had a conversation with Sidney Handy, the plaintiff, did you not? A. I had several conversations.

"Q. And at that time, isn't it a fact that he told you that the property had been conveyed to him and you were to pay the rent to him thereafter? A. Yes.

"Q. And notwithstanding that, you paid it to the sheriff? A. I did."

[3] The court found all of the allegations of the complaint were true; also, that the allegation on information and belief in defendant's separate answer and defense, to the effect that Harriett Morrow had conveyed said property to plaintiff, was true.

No evidence of the record of the transfer was offered. The transcript reveals, however, that the case was tried on the theory that such was the fact. For example, in the colloquy between the court and defendant's counsel, the following appears: "Mr. Wilson: (Defendant's counsel) I just want to make the record clear. The defendant Fitschen now offers to prove that the plaintiff Sidney Handy, if he is, in fact, the owner of the property, took the property with knowledge of the fact that the property, that is, the rentals due, had been attached, * * * and that the conveyance, if any, to him, was colorable merely, and * * * without consideration." Again, as follows:

"The Court: Do you want to try to show in this case of Handy v. Fitschen, that the conveyance from Morrow to Handy was void?

"Mr. Wilson: That it was voidable. * * *

"The Court: But that was prior to the conveyance from Morrow to Handy, wasn't it?

"Mr. Wilson: Yes.

"The Court: All right.

"Mr. Wilson: We desire to show that any asserted interest of Mr. Handy in the property, was acquired by him with the knowledge of these prior attachments * * *; that any asserted conveyance from Mrs. Morrow to Mr. Handy was made for the express purpose of avoiding a repetition of such garnishments as had been made in December and January; that Mr. Handy did not pay any consideration for the property in question; in other words, that the conveyance was made for the purpose and the purpose only, of avoiding making such garnishments."

Appellant urges as the second ground of his appeal, and so far as the record reveals it is the initial appearance of such claim, that proof of the conveyance from Morrow to Handy is wholly lacking and that the finding thereon is unsupported by any evidence.

Assuming that such proof was necessary, to complain of its absence at this late date, in the light of the record, is unavailing.

"Where an issue is tacitly accepted by all the parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory. * * * When a case is tried upon the theory that certain facts exist, even though they are put in issue by the pleadings, their existence will be assumed on appeal." National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 131 P. 755, 756. The case at bar is well within this rule.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 612

PEOPLE v. MORGAN.

Cr. 315.

District Court of Appeal, Fourth District, California.

Oct. 29, 1935.

1. Criminal law 🔑274

Granting of defendant's application to change his plea is within sound discretion of trial court, and his decision will not be disturbed except for an abuse of discretion.

2. Criminal law 🔑274

Burden of showing cause for change of plea from guilty to "not guilty by reason of insanity" rests upon defendant, and he should be required to produce evidence to show that there was reasonable grounds to believe that at time of commission of crime he was legally insane and so mentally diseased that he was not conscious of its wrongful nature (Pen. Code, § 1016; Const. art. 1, § 8, as amended in 1934).

3. Criminal law 🔑274

Refusal to permit defendant who had entered plea of guilty to charge of committing lewd and lascivious act on female child, to plead "not guilty by reason of insanity" based upon affidavits that defendant had suffered considerable mental deterioration *held* not abuse of discretion, where it did not appear that defendant was so deranged that he was not conscious of wrongful nature of his act (Pen. Code, § 288, as amended by St. 1933, p. 1028; § 1016; Const. art. 1, § 8, as amended in 1934).

4. Criminal law 🔑1023(3)

Order denying motion to plead "not guilty by reason of insanity" which was entered before judgment *held* not appealable, although order was reviewable on appeal from denial of motion (Pen. Code, §§ 1016, 1237; Const. art. 1, § 8, as amended in 1934).

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Frank Morgan was charged with having committed a lewd and lascivious act on a female child in violation of Penal Code, § 288, as amended by St. 1933, p. 1028, to which he entered a plea of guilty. From an order denying his motion for permission to enter a plea of not guilty by reason of insanity, he appeals.

Affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment and from an order denying defendant's motion for permission to enter a plea of not guilty by reason of insanity. The sole question to be determined here is whether the trial court erred in denying the motion.

By a complaint filed in the justice's court of Redlands township in San Bernardino county, dated May 22, 1935, defendant was charged with violation of the provisions of section 288 of the Penal Code (as amended by St. 1933, p. 1028) on the person of Belinda Bartlett, a girl under the age of 14 years. He was brought into that court on June 4, 1935, and entered a plea of guilty. He was accompanied by two counsel of his own selection. The case was certified to the superior court where he appeared with his counsel on the same day, waived time, and was arraigned for sentence. He applied for probation, and the matter was continued to June 17th, and again continued until June 24, 1935. On that day the report of the probation officer was presented to the trial judge, but the case was continued for one week on request of defendant to permit him to obtain new counsel. On July 1st, defendant was again in court with the counsel who had formerly represented him and counsel who now represents him on this appeal. The former were discharged and the latter became his sole counsel.

Defendant moved for an order permitting him to enter a plea of not guilty by reason of insanity, which motion the trial court denied and proceeded to sentence him to confinement in the penitentiary. There was no motion to permit defendant to withdraw his plea of guilty or to change it to a plea of not guilty.

The proceedings were had under the constitutional amendment adopted by the people at the election held on November 6, 1934. Section 8, art. 1, Const. This section provides that after the plea of guilty is entered in the justice's court the magistrate shall immediately commit the defendant to the sheriff and certify the case, including all proceedings before him, to the superior court, "and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court." Section 1016 of the Penal Code provides, in part, as follows: "There are five kinds of pleas to an indictment or information: 1. Guilty. 2. Not guilty. * * * 5. Not guilty by reason of insanity. A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."

It should be observed that there is a strong intimation in the foregoing section that a defendant who pleads guilty may not also plead not guilty by reason of insanity. It might be urged that the reason for this is that the pleas of guilty, and not guilty by reason of insanity, are so inconsistent that they should not be entered to the same charge by a defendant. A plea of guilty admits, not only the commission of the offense charged, but the sanity of the defendant at the time he committed it, for a person legally insane cannot be guilty of the commission of a crime while such legal insanity exists. The plea of not guilty by reason of insanity, without other plea, admits the commission of the charged offense, but the defendant making it seeks to avoid the consequence of his act by alleging that he was legally insane and legally incompetent to commit a crime, and therefore not guilty. It is a plea of confession and avoidance. However, for the purpose of this case the question is unimportant. We will assume without holding, that a defendant may enter both pleas if he does so at the proper time.

[1] It seems to be settled that a defendant desiring to change his plea must show good cause therefor, and that the question of granting the application is a matter within the sound discretion of the trial judge whose decision will not be disturbed on appeal, except for an abuse of that discretion. People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A. L. R. 806; People v. Egan, 218 Cal. 408, 23 P.(2d) 755; People v. Nye, 96 Cal. App. 186, 273 P. 837; People v. Nolan, 126 Cal. App. 623, 14 P.(2d) 880.

[2] The burden of showing good cause for the change of plea rests upon the defendant. He should be required to produce evidence which would show the trial judge that there were reasonable grounds to believe that at the time of the commission of the crime he was legally insane and that he was so mentally diseased that he could not distinguish between the right and the wrong of his act, or that he was not conscious of its wrongful nature. People v. Egan, supra; People v. Gilberg, 197 Cal. 306, 240 P. 1000.

In support of the motion defendant produced the affidavit of his son. The pertinent facts of this affidavit may be summarized as follows: That about October 8, 1928, defendant was struck by an automobile and rendered unconscious for about four hours; that affiant was informed defendant suffered concussion of the brain; that subsequently thereto affiant noticed a deterioration in the mental capacity of defendant and thought he was gradually losing his mind; that affiant first saw defendant after his arrest on June 5, 1935, and talked with him on that day; that affiant "noticed that his father did not seem to be perturbed or to realize at all the seriousness of the offense which he had been charged with; affiant noticed further that his father's mental condition was worse than when he had last seen him, and he was convinced, because of the nature of the charge and the nature of the acts filed against defendant, that the defendant was insane"; that affiant talked to his brothers and others and that all of them "told him that they had noticed for some time a marked decline in the mental faculties of said defendant"; that one friend told him "that it was his opinion that the defendant was mentally unbalanced"; that affiant took defendant to Dr. Walter Pritchard for examination, who reported that defendant was mentally unbalanced and showed marked signs of senile dementia; that affiant caused a second examination to be made on June 20, 1935, by Charles Lewis Allen, an eminent and experienced psychiatrist of Los Angeles, who reported that "I have formed the conclusion that Mr. Morgan is suffering from a senile dementia which is already sufficiently advanced to seriously impair his judgment, responsibility and ethical sense and his ability to realize the nature and probable consequence of his acts;" that affiant alleges "that the defendant * * * is at this time insane and suffering from senile dementia and that he was insane at the time he is charged with performing the acts alleged in the complaint."

The trial judge had before him copies of the reports of Doctors Pritchard and Allen. These were made a part of the report of the probation officer. It appears that defendant was 70 years of age. The record contains a certificate by the trial judge that the report had been read and considered by him.

The report of Dr. Pritchard is extensive and shows that his examination and observation of defendant commenced on June 1 and ended on June 15, 1935. He states in his report: "The patient seems quite intelligent and cooperates well. He is a mentally alert, erect, elderly white male looking somewhat younger than his age." The doctor further states, "there has occurred a gradual but noticeable change in character" of defendant and "the patient's conduct and behavior have shown definite evidence of impairment of critique and self discipline."

The findings of Dr. Allen on the mental condition of defendant have already been quoted in the summary of the contents of the affidavit of the son of defendant.

The extensive report of Dr. Pritchard and the probation officer disclose many facts that could have been obtained only from defendant. These facts bear out the opinion expressed by Dr. Pritchard, that he had an alert mind and was possessed of a fairly good memory.

[3] There is a distinction between what we may term medical insanity and the legal insanity that will relieve a defendant from the consequences of his criminal acts. A defendant may have insane delusions or hallucinations and still if, at the time of the commission of a crime, he was conscious of the wrongful nature of the act and had sufficient reasoning capacity to distinguish between the right and the wrong of the act he cannot escape its legal consequences. There is nothing in the evidence to force the conclusion that defendant was so deranged and mentally diseased that he was not conscious of the wrongful nature of his act, or that he could not distinguish between the right and the wrong of that act. The evidence only shows that he had suffered considerable mental deterioration at that time. For that reason we cannot conclude that the trial court abused its discretion in refusing to permit defendant to change his plea by adding to his plea of guilty the plea of not guilty by reason of insanity.

[4] The order denying the motion was made before judgment and may be reviewed on an appeal therefrom. It is not an appealable order. Section 1237, Pen. Code. The attempted appeal from that order is dismissed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

10 Cal.App.2d 22

MAGNOLIA PARK NAT. BANK OF BURBANK v. BANKS, HUNTLEY & CO.

Civ. 5431.

District Court of Appeal, Third District, California.

Nov. 5, 1935.

Hearing Denied by Supreme Court Jan. 3, 1936.

Brokers ⚷36

Bank's acceptance of proceeds from sale of bonds by brokerage company which agreed to make sale without commission without knowledge that brokerage company had made a secret profit *held* not a ratification of company's retention of secret profits from such sale; hence bank was entitled to recover profits.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Magnolia Park National Bank of Burbank against Banks, Huntley & Co. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

Hearing denied by Supreme Court; SHENK, THOMPSON and CONREY, JJ., dissent.

M. G. Luddy and Patrick F. Kirby, both of Los Angeles, for appellant.

M. M. Holman, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff brought this action to recover secret profits alleged to have been withheld by the defendant from the plaintiff on account of the sale of certain bonds owned by the plaintiff and delivered to the defendant for the purposes of sale. The defendant had judgment, and from this judgment the plaintiff appeals.

The record shows that on or about the 10th day of February, 1932, the plaintiff bank was in process of voluntary liquidation. Among its assets were four groups of bonds which it had deposited with the respective treasuries of the city of Los Angeles, the county of Los Angeles, the city of Burbank, and the state of California. Banks, Huntley & Co., a corporation, was and is engaged in business as a stock and bond broker, with its principal place of business in Los Angeles. The defendant was financially interested in the plaintiff bank, in that it was interested in the Pacific Properties Corporation, and this last corporation was one of the stockholders of the plaintiff bank.

Some time prior to February 11, 1932, F. H. Schenk, the cashier of the plaintiff bank, and V. P. Lester, representing the defendant corporation, had two conferences. One of these conversations turned on the matter of the bonds to which we have referred, and which were placed as security for deposits. Lester recommended that the bonds be sold and the deposits paid off. Schenk agreed to this, provided it be ratified by the board of directors of the plaintiff, and told Lester that he could not act without the approval of the board. Lester then asked him to take the matter up with the board and secure its consent, and at a meeting of the board held thereafter, the board of directors passed a resolution instructing the cashier to close out the deposit of public moneys, and to sell all the bonds pledged to secure these deposits. The sale was to be made through the defendant company at the prevailing market price, but in no case at a price to exceed 1 per cent. less than the prices shown in a schedule attached to the resolution. The resolution further stated that any sale of bonds not in conformity with the resolution must be approved by the board of directors. The defendant accepted the employment and agreed to handle the sale of the bonds without compensation. This agreement to act without compensation appears to have been based upon what we have heretofore stated as the interest of the defendant in stock in the plaintiff bank. The record shows, however, that the defendant company, after performing the services referred to in the disposing of the bonds, emerged with a profit of $3,431.53.

The record further shows that the defendant not only made the profit which we have just stated, after having agreed to handle the sale of the bonds without compensation, but kept the fact of this profit from the knowledge of the plaintiff. The defendant reported its sale of the bonds, and paid to the plaintiff the sum of $262,923.19. The bonds actually brought the sum of $266,582.21. From this sum the plaintiff admits that there should be deducted the sum of $227.49 as a legitimate expense account.

Preceding the sale of the bonds, the following communication was addressed to

Banks, Huntley & Co. by the cashier of the plaintiff:

"February 26, 1932.

"Banks, Huntley & Company, 634 South Spring Street, Los Angeles, California.

"Gentlemen: Under date of February 11, 1932, we authorized you to sell certain bonds as outlined in our letter, which sale you have now completed.

"So that the records of this bank might be complete, and to assist the directors in ratifying the sale of bonds made for our account, the directors have requested that I write asking that you direct a letter to their attention in care of this bank, stating that the sale of bonds was made in conformance with our letter of February 11, 1932. Your assistance in this matter will be appreciated.

"Very truly yours,
"Floyd H. Schenk, Cashier."

On the 12th day of April, 1932, the defendant wrote to the plaintiff as follows (reporting the disposal of the bonds):

"Banks, Huntley & Co.
"Investment Securities.
"Los Angeles. March 31, 1932.

"Magnolia Park National Bank, Burbank, California.

"Att: Mr. F. L. Schenk, Cashier:

"Gentlemen:

"This will acknowledge receipt of your letter of February 26 with reference to sale of bonds for your account in accordance with instructions contained in your letter of February 11.

"All of these bonds were sold at the prevailing market price and in all but one instance this price equals or exceeds the minimum price mentioned in your letter of February 11th.

"The one exception was the sale of $15,000.00 Los Angeles Electric plant 4/s of 1934 and 1958 which in accordance with telephone communication at the time was due to the fact that the maturities of this lot of bonds were incorrectly stated to us originally, so that the price mentioned in your letter of February 11th was based on our original quotation and was therefore incorrect.

"Very truly yours,
"Banks, Huntley & Company,
"By N. L. Wright."

The defendant at the trial offered testimony to establish novation to prove that the original contract had been changed. The testimony introduced in that behalf, however, does not establish any such contention. It appears conclusively upon the record that even though the defendant, under a later agreement, bought a portion of the bonds itself, it was to purchase the bonds at the prevailing market price, which the record shows that it did not do. We quote here the testimony of the witness Lester, who was acting for the defendant in relation to the purchase of the bonds by the defendant, as follows: "The original arrangements which we made with Mr. Schenk on or about February 10th or 11th, after the delivery of plaintiff's exhibit 2, was changed as the result of the telephone conversation I had with Mr. Schenk. In that conversation Mr. Schenk agreed that Banks, Huntley & Company might buy these bonds themselves at the prevailing market price, provided that price exceeded the minimum at that time. That is, that Banks, Huntley & Company were to buy the bonds and pay the plaintiff the prevailing market price. At the time of this conversation, which was on February 17th, at least $120,000.00 of the bonds had already been sold by Banks, Huntley & Company. We had commitments for that amount and had committed ourselves. We had not received the money for the bonds. I said nothing to Mr. Schenk as to what we would pay Magnolia Park National Bank for the bonds we had already sold."

This testimony conclusively shows that not only had $120,000 worth of bonds been already sold, though not yet delivered, but that whatever bonds the defendant was to purchase should be purchased and paid for at the prevailing market price. The court in its finding set forth the defendant was not entitled to any commission for its services. It did find, however, that the plaintiff had ratified the acts of the defendant, and therefore that judgment went in favor of the defendant.

While the briefs of counsel contain page after page of argument as to the authority of Schenk as cashier of the plaintiff bank to agree to a novation or change in the original agreement, we do not find it necessary to enter into any consideration or discussion in this opinion of that question as the testimony in the case which we have set forth, and which is also supported by the witness Wright, an officer of the defendant, is to the effect that the bonds were to be sold at the prevailing market price. In fact, Mr. Wright testified that he wrote the appellant as follows: "All these bonds were sold at the prevailing market price, and in all but one instance this price equals or exceeds the minimum price mentioned in your letter of February 11th." This witness also stated that he meant that the price remitted to the appellant was the prevailing market price at the time of the transaction.

While contended for by the respondent, there is absolutely no testimony in the record indicating that Banks, Huntley & Co. were to buy the bonds, or any of the bonds, at prices set forth in the release schedule, for less than which the bonds were not to be sold; nor is there anything in the record, as contended for by the respondent, that the bonds were to be sold or purchased by the defendant at less than the prevailing market prices.

A large portion of the respondent's brief is devoted to a discussion of the credibility of the witness Schenk. Irrespective of whether the testimony of the witness Schenk be considered reliable or unreliable, the testimony of the defendant's witnesses which we have set forth herein shows without any equivocation that the defendant, whether it sold or bought the bonds, was bound by the prevailing market price.

A considerable portion of the briefs also is devoted to a discussion of the arrangement which had to be made for the release of the bonds through the Farmers & Merchants National Bank of Los Angeles. This discussion, however, has no relevancy to the questions presented for our consideration.

On February 11, 1932, the following letter was addressed to the defendant company by Floyd H. Schenk, to wit: "You are authorized to sell for our account all of the bonds that the treasurer of the City of Los Angeles, County of Los Angeles, State of California, and City of Burbank holds for our account, as shown by the schedule herein below, at the prevailing market price, but in no case at a price to exceed one percent less than the prices shown by the following schedule:" (Here follows a schedule of all the bonds); concluding as follows: "We have authorized the Farmers & Merchants National Bank of Los Angeles to receive your orders for any of these bonds, together with your check, which will include in all instances the interest to the date of delivery, and they will in turn complete the transaction with the various treasurers."

Inclosed with this letter was a letter which was sent to the Farmers & Merchants National Bank, authorizing that bank to surrender the bonds upon receipt of a check in a sum less than the schedule of prices named, not exceeding 1 per cent. This authorization of the Farmers & Merchants National Bank to surrender the bonds and deliver them to the defendant at a less figure than the prevailing market price had nothing to do, and has nothing to do, with the authorization of the defendant to sell the bonds at the prevailing market price, nor has it anything to do, nor did it have anything to do, with the right of the defendant to purchase a considerable portion of the bonds at less than the prevailing market price.

We do not need to discuss the testimony or the contention of the respondents in relation to whether the defendant agreed, or did not agree, to put up any money of its own in view of the finding of the court that the defendant was not entitled to any commission for its services.

We may here state that there is absolutely no evidence in the record to the effect that the defendant was authorized either to sell or to buy the bonds, or any portion thereof, for the sum of $260,105.92, while the testimony shows that the prevailing market price of the bonds was the sum of $266,582.21.

While the record set out in the transcript, taken from the books of the defendant, shows that the defendant realized in the sale of the bonds the sum of $266,582.21, the record is clear, as shown by the testimony of the vice president of the defendant, that this amount was not remitted to the plaintiff, or to any one authorized to receive the money on behalf of the plaintiff. The vice president of the defendant testified substantially as follows: The total amount which my company remitted to the plaintiff bank as representing the alleged sale price of the bonds was $262,923.19. We remitted this to the Farmers & Merchants National Bank through the Security Bank for credit to the plaintiff bank. The Security Bank remitted it for our account to the Farmers & Merchants National Bank, and the Farmers & Merchants in due course remitted it to the Magnolia Park National Bank.

We may add that the total amount of money received by the plaintiff bank was the sum just stated.

The witness Lester, on behalf of the defendant, in explanation of a letter which he had written to the plaintiff, testified as follows: "When I wrote 'All these bonds were sold at the prevailing market price and in all but one instance this price equals or exceeds the minimum price mentioned in your letter of February 11,' I meant that the price remitted to the Magnolia Park National Bank was the prevailing market price at the time of the transaction."

There is absolutely no testimony in the record to the effect that the defendant was authorized to fix its own price in the purchase of the bonds, but the testimony of Mr. Lester and Mr. Wright, to which we have referred, is unequivocal that the price to be paid by the defendant was the prevailing market price. It must be borne in mind in this connection that the defendant had already made sale of $120,000 worth of the bonds at the prevailing market price.

As we have said, there is absolutely no testimony to support novation as claimed by the respondent, nor is there any testimony in the record to support the finding of the court that the plaintiff had ratified the acts of the defendant in withholding the secret profits which we have heretofore mentioned.

The record shows that on or about February 24, 1932, the plaintiff becoming apprehensive that the transaction had not been entirely regular, to say the least, addressed a letter to the respondent making inquiries as to the sale of the bonds, and whether the bonds were sold in accordance with the original agreement of February 11, 1932, which we have set forth herein. This letter was not replied to by the respondent for a number of weeks, and in the reply, as we have shown, N. L. Wright, an officer of the company, reported and represented to the plaintiff that the bonds had all been sold for the prevailing market prices in all but one instance. There was no intimation in the latter that Banks, Huntley & Co. had bought the bonds for themselves, and there was a direct affirmation that the amount remitted to the Farmers & Merchants National Bank for the plaintiff was the full and correct prevailing market price. This, of course, as we have shown by the funds remitted by the defendant and the moneys received by the defendant, was not a correct statement of the transaction.

There is nothing in the record to show that the plaintiff bank, when receiving the lesser sum of money than should have been remitted, had any knowledge whatever of the secret profit made by the defendant. The claim of the respondent that the bank having kept the money and not having turned it back is in no position to now claim the right to the secret profit, is entirely without foundation in law. The allegation in the amended answer of the defendant is in the following words: "Thereafter, and on or about the 19th day of February, 1932, the said plaintiff being fully advised, and with full notice and knowledge of the said new oral agreement, and its terms and conditions, ratified, confirmed and approved the same, and with said knowledge and notice, and as a part of the ratification, approval and confirmation, accepted the benefits and proceeds of the said new oral agreement."

As we have shown by the record, and as conclusively appears therefrom, there is not a word of testimony supporting the allegation, and therefore the finding of the court to that effect is wholly unsupported. The following cases support the statement that there can be no ratification without full knowledge: Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P. 902; Dean v. Bassett, 57 Cal. 640; Munroe v. Fette, 1 Cal. App. 333, 82 P. 206; Lindow v. Cohn, 5 Cal. App. 388, 90 P. 485; Hutchinson v. Scott, Magner & Miller, 35 Cal. App. 171, 169 P. 415. This last-mentioned case contains a number of citations supporting the fact that ratification can be held only when that ratification is based upon knowledge of the transaction.

We might cite a larger number of cases supporting the rule which we have stated, but it is so commonplace that an agent must deal openly and honestly with his principal, and cannot be allowed to retain secret profits, that we deem it unnecessary to cite authorities.

The record in this case showing without dispute that the defendant was to handle the transaction without compensation; that the defendant was obligated to sell the bonds for the prevailing market price; that the defendant did not do so; that the defendant reported to the plaintiff that it had sold the bonds for the prevailing market price, the record showing that the plaintiff had no knowledge of the retention of a secret profit by the defendant at the time it accepted the remittance of the money made by the defendant; the court having found that the defendant was not entitled to any compensation for its services; it necessarily follows that the judgment must be reversed, with directions to the trial court to find in accordance with the testimony as we have just outlined, and then enter judgment in favor of the plaintiff for the amount of the secret profits retained by the defendant, as set forth in this opinion, following the procedure approved in the case of Essey v. Phillips, 136 Cal. App. 3, 28 P.(2d) 38.

Judgment reversed, with directions.

We concur: PULLEN, P. J.; THOMPSON, J.

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9 Cal.App.2d 675

HONAN et al. v. TITLE INSURANCE & TRUST CO. et al.

Civ. 5433.

District Court of Appeal, Third District, California.

Nov. 1, 1935.

1. Appeal and error 🔑78(3)

Order granting defendants' motion to strike complaint from file *held* in effect "final judgment" and appeal lay therefrom (Code Civ. Proc. § 577).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

2. Pleading 🔑354(1)

Where complaint alleged that note was usurious and that person signing note and trust deed as attorney in fact for one of plaintiffs had no authority, striking entire complaint *held* error, although relief sought therein as to injunction against sale under trust deed involved moot question, since sale had already occurred.

3. Pleading 🔑352

To constitute moot question warranting dismissal of entire complaint, it must affect entire subject-matter of pleadings and be completely moot.

4. Pleading 🔑354(1)

Where other facts are pleaded, though imperfectly, motion to strike out entire pleadings should be denied, notwithstanding pleadings also involve moot question.

5. Pleading 🔑354(1)

Since facts alleged may become moot at any time before judgment, facts need not constitute mooted question when complaint is filed, as regards propriety of striking entire complaint.

◆

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by Cecilia Effie Honan and another against the Title Insurance & Trust Company and others. From an order striking out the complaint, plaintiffs appeal.

Reversed, with instructions.

McGee & Robnett and Robert Lee Collins, all of Los Angeles, for appellants.

G. E. Delavan, Jr., of Los Angeles, for respondents.

MAXEY, Justice pro tem., delivered the opinion of the court.

The plaintiffs have appealed from an order duly made and entered striking out their complaint. The facts alleged in the complaint are that on March 17, 1931, a note was made, executed, and delivered by William James Honan and Effie L. Honan, by William J. Nichols, her attorney in fact, to the defendants herein; that said note was secured by a deed of trust on certain real property situated in Los Angeles county, and also signed by William James Honan and by William J. Nichols, as attorney in fact for Effie L. Honan. It is further alleged that Cecilia Effie Honan and Effie L. Honan are one and the same person. The complaint was filed on August 19, 1933. The complaint further alleges that on or about the 24th day of April, 1933, the defendants caused to be recorded a notice of breach of obligation and default on the part of the plaintiffs in the payment of said note secured by said trust deed; and that thereafter the property was advertised for sale under the terms of the deed of trust to be sold on August 19, 1933.

The plaintiffs alleged that the note given to defendants bears a usurious rate of interest; that the note and deed of trust were not signed by the plaintiff, Cecilia Effie Honan, and, further, that William J. Nichols, who signed said note and deed of trust as her attorney in fact, was not authorized or empowered to sign the note and deed of trust; that there is a dispute between the parties relative to the amount owing on said note, and asking that the exact amount be determined by the court in the way of a declaration; that the deed of trust is a lien or incumbrance upon the property of the plaintiff, Cecilia Effie Honan, and that it will be and remain a cloud upon her title. Plaintiffs seek relief for each of these alleged infringements of their rights, and further request an injunction to prevent the sale of the real property under the deed of trust on the 19th day of August, 1933.

The defendants filed a motion to strike out the complaint and also certain portions thereof. This motion was predicated upon the affidavit of the attorney of record for defendants, in which affidavit it was stated that the question therein involved was a moot question because the property had been sold on August 19, 1933, and therefore injunctive relief against the sale would be unavailing. A general and special demurrer were filed at the same time. The motion to strike out the complaint was granted, and the complaint was ordered stricken from the files. The demurrer was ordered off calendar.

[1] The granting of defendants' motion to strike the entire complaint from the file was a complete and final determination of the action, and was therefore in effect a final judgment therein. No further proceedings in that case could be had by the plaintiff therein, nor was there any further action required upon the part of the defendants to defeat plaintiffs' contention. A judgment is the final determination of the rights of the parties in an action or proceeding. Code Civ. Proc. § 577. An appeal will lie from an order striking an entire complaint from the file. Howe v. Key System Transit Co., 198 Cal. 525–531, 246 P. 39.

[2-4] The facts stated in the complaint allege not only grounds for injunctive relief, but also for other and different relief not necessarily connected with enjoining the sale of the property under the deed of trust. These facts may not have been as clearly and distinctly stated as required by good pleading, but this defect, if any existed, could have been corrected by an amendment of the complaint. The complaint in this case states that unless an injunction is issued preventing the sale of the property under the deed of trust, that the sale of said property will be held on the same day upon which the complaint was filed, namely, on August 19, 1933; no injunction was issued, and therefore the sale was presumably had on that date. So far as the complaint related to the enjoining of the sale of the property mentioned in the complaint, it became a moot question on and after the date of the sale on August 19, 1933, particularly since no restraining order was issued at that time, and had the complaint gone no further into allegations affecting other matters, the granting of the motion to strike the complaint from the file would have been proper. The effect of the complaint, however, was to further charge defendants with a violation of the usury law of the state of California. This was not a moot question, but one which, if properly pleaded, would entitle the plaintiff to relief, at least in some measure, upon the note set up in the complaint. The complaint further alleged facts on behalf of the plaintiff, Cecelia Effie Honan, which, if properly pleaded and proven, would have entitled this plaintiff to some relief. These questions on behalf of this particular plaintiff did not become moot by reason of the sale under the foreclosure of the deed of trust, but continued to be questions of vital importance to this particular plaintiff and upon which she was entitled to a final decision or determination. In order to constitute a moot question that would warrant the granting of a motion to dismiss the entire complaint, it must affect the entire subject-matter of the pleadings and be "completely moot." Where other facts are pleaded, even though imperfectly, a motion to strike out the entire pleadings should be denied.

[5] Facts alleged in any pleadings may become moot at any time prior to judgment, and it is not necessary that those facts should appear or should be a mooted question at the time of the filing of the complaint.

The judgment and order appealed from are reversed, with instructions to the trial court to deny the motion to strike out the complaint herein; and that said motion as to paragraph VIII of the first cause of action be denied; and that said motion, as contained in paragraphs B, C, D, E, F, and G thereof, and pertaining to the second cause of action, should be granted.

We concur: PULLEN, P. J.; THOMPSON, J.

9 Cal.App.2d 749

In re CONTEST OF ELECTION OF CLAIRE.

HAUN v. CLAIRE.

Civ. 1571.

District Court of Appeal, Fourth District, California.

Nov. 4, 1935.

1. Elections 🔑303

In election contest, court may properly enter judgment of nonsuit as equivalent of judgment confirming election (Code Civ. Proc. §§ 1111, 1122).

2. Elections 🔑300

In election contest based upon defendant's violation of statute prohibiting hiring of any person for purpose of procuring attendance of voters at polls with intent to promote election of himself or any other person, evidence of defendant's violation of statute *held* insufficient for jury (Code Civ. Proc. §§ 1111, 1122; Pen. Code, § 54, subd. 3).

3. Elections 🔑293(6)

In contest of election on ground that defendant violated statute providing for punishment of person hiring any person to procure attendance of voters at polls with intent to promote election of himself or any other person, rejection of evidence that defendant had paid witness after election for taking voters to polls *held* not reversible error in absence of evidence that witness was working in behalf of any candidate (Pen. Code, § 54, subd. 3).

4. Elections 🔑293(6)

In contest of election for violation of statute providing for punishment of any person hiring any other person to procure attendance of voters at polls with intent to promote election of himself or any other candidate, rejection of evidence that defendant had paid witness nothing for transportation of voters to polls *held* not reversible error (Pen. Code, § 54, subd. 3).

5. Appeal and error 🔑1031(1)

Prejudice from error in undue limitation of cross-examination of party called by adverse party as witness for cross-examination will not be presumed in absence of proffer of proof (Code Civ. Proc. § 2055).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Proceeding to contest the election of Lloyd Claire as Councilman of the City of Newport Beach, Orange County, California, pursuant to a municipal election held April 9, 1934, by William M. Haun against Lloyd Claire. Judgment for defendant, and plaintiff appeals.

Affirmed.

Edgar L. Martin, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy and R. M. Crookshank, all of Santa Ana, for respondent.

MARKS, Justice.

At a municipal election held in the city of Newport Beach, in Orange county, on the 9th day of April, 1934, Lloyd Claire was elected a councilman of that city. William M. Haun received the next highest number of votes. Mr. Haun brought this proceeding under the provisions of section 1111 of the Code of Civil Procedure to contest the election of Mr. Claire for alleged violation of provisions of subdivision three of section 54 of the Penal Code.

Section 54 of the Penal Code contains the following: "Every person who, with intent to promote the election of himself or any other person, either— * * * 3. Furnishes or engages to pay or deliver any money or property for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring attendance of voters at the polls, except for the conveyance of voters who are sick or infirm; * * * —Is guilty of a misdemeanor."

The particular violation alleged in the complaint is that Claire hired "automobiles and the drivers thereof to take voters to the polls at said election who were neither sick nor infirm" for the purpose of promoting his election to the office for which he was a candidate. It is particularly alleged that he paid Malcom D. Robertson $3.50, Charles W. Fowler $5, and John D. Willey $4.

At the close of contestant's case a motion for nonsuit was made and granted. A judgment of dismissal was entered which carried costs in the sum of $44.30.

Contestant presents the following grounds for a reversal of the judgment: (1) That under the provisions of section 1122 of the Code of Civil Procedure a judgment of nonsuit is improper in the contest of an election; (2) that the evidence produced made out a prima facie case against Claire and that it was error to grant the motion for nonsuit; (3) errors of the trial court in ruling on objections to questions propounded to witnesses.

[1] Section 1122 of the Code of Civil Procedure provides as follows: "The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election."

In the case of Bernardo v. Rue, 26 Cal. App. 108, at page 115, 146 P. 79, 81, the court states that "whether or not a motion for nonsuit is the proper proceeding in an election contest may be open to question." In the case of Langley v. Head, 142 Cal. 368, 75 P. 1088, 1090, a motion for nonsuit was made and granted and judgment of dismissal entered. In commenting upon this procedure the Supreme Court said: "Upon the showing made in the trial court, the contestee was entitled to a judgment confirming his election. Section 1122, Code Civ. Proc. Such is the practical effect in this case of the judgment of dismissal. The judgment is affirmed." We are of the opinion that this holding should be conclusive here.

[2] We have studied the record and have reached the conclusion that under the quoted language of section 54 of the Penal Code and the allegations of the complaint the evidence failed to make out a prima facie case against Claire. Robertson, Fowler, and Willey were called as witnesses for the contestant and testified. Robertson testified that he transported no voters to the polls and that Claire paid him nothing for any such work. Fowler testified he was engaged by another, not by Claire, to take voters to the polls, and there is no evidence that Claire paid him anything. Willey testified that he drove an automobile and transported voters to the polls. He was not engaged by Claire nor was he instructed by him as to his duties, but by another who was not shown to have been acting for Claire or to have had any connection with him or interest in his candidacy. After the election Claire paid Willey four dollars. No one promised or agreed to pay Willey any compensation for his work on election day and nothing was said to him on that subject at any time by Claire. Willey testified as follows:

"Q. What car were you assigned to drive? A. Why, Mr. Gant's of Newport.

"Q. You say Mr. Reinhart assigned you to drive this car? A. Yes, sir.

"Q. Where was that car? A. At the city hall.

"Q. And he told you to get in that car and drive that car? A. Yes, sir.

"Q. Did he tell you what voters to take to the polls? A. No, sir.

"Q. How did you find out what voters to take to the polls? A. Well, just merely driving around and picking them up.

"Q. In other words, did he give you a list of voters you were to take to the polls? A. No, sir.

"Q. In other words, you simply drove around there and any voters you thought wanted to go to the polls you simply offered to take them? A. Yes, sir.

"Q. Did you ask the voters any questions as to who they were for or anything? A. No, sir."

If we assume that Claire paid Willey the $4 for transporting voters to the polls on election day, we cannot see how that bare fact brings the case within the provisions of section 54 of the Penal Code. All Willey did was to transport all the voters to the polls whom he saw and who wanted to vote. He was not working in behalf of any candidate or political faction. He may have transported more voters who cast their ballots for Haun than for Claire. The evidence shows that he was engaged in the praiseworthy work of "getting out the vote." If Claire paid him for this, we cannot see how it could be said that the payment, made by Claire after the election, was made "with intent to promote the election of himself or any other person." Section 54, Pen. Code.

[3-5] The record shows that the trial judge was unduly technical in ruling on objections made by counsel for respondent to questions propounded to witnesses by counsel for contestant, and in granting motions to strike made by counsel for respondent, and thereby committed errors. He struck out the testimony of Willey that Claire paid him $4 after the election. We have treated the case as though this an-

swer remained in the record, and from what we have already said it is apparent that we can find no reversible error in the ruling. He also struck out an answer by Fowler that Claire had paid him nothing for hauling voters to the polls. Of course, as Claire had paid Fowler nothing for transportation of voters to the polls the ruling could not have prejudiced the contestant. Claire was called by contestant as a witness for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. We are of the opinion that the trial judge unduly limited this cross-examination. Counsel for contestant made no proffer of proof and did not inform the trial judge, and has not informed us, what he expected to prove by this witness. We cannot presume prejudice in an error of this kind.

Where one party is successful in a proceeding of this kind, he is entitled to recover his costs against the other. Section 1125, Code Civ. Proc.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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9 Cal.App.2d 747

LUNDY v. MOSLEY.

Civ. 1473.

District Court of Appeal, Fourth District, California.

Nov. 4, 1935.

Husband and wife 🔑335

In husband's action for alienation of wife's affections against employer of married daughter to whose home wife went after leaving plaintiff after receiving railroad ticket which had been purchased with check signed by defendant, evidence of defendant's liability *held* insufficient for jury.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Oscar L. Lundy against John Mosley. Judgment for defendant, and plaintiff appeals.

Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

Rutan & Mize, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for alienation of affections based upon an allegation that the defendant enticed the plaintiff's wife "away from the plaintiff's and her then residence in the state of Missouri, to a separate residence, in the state of California, and has ever since there detained and harbored her." From a judgment in favor of the defendant, the plaintiff has appealed, the only point raised being that the court erred in directing a verdict.

Appellant and his wife were married on October 9, 1929, and lived together in Kansas City until August 24, 1932, except for certain intervals when the appellant was confined in the penitentiary or in jail. On the last-named date Mrs. Lundy left their home and came to California using a railroad ticket which had been sent to her by her married daughter. This daughter and her husband were employed by the respondent in running a service station and lunch counter in Orange county, Cal., and also lived at the respondent's home. Mrs. Lundy came to this home and has since obtained a divorce from the appellant.

The appellant seems to rely upon the fact that he had discovered that the railroad ticket used by his wife in coming to California was paid for with a check for $40 signed by the respondent. It appears from the uncontradicted evidence that the married daughter referred to had formerly lived in Kansas City where she had observed the appellant's treatment of her mother; that she and her husband had removed to California in June, 1932; that before she left Kansas City her mother planned to leave the appellant, and she promised to send for her as soon as she was able to do so; that she sent her mother a railroad ticket which was paid for by a check which she obtained from her employer; and that at the time Mrs. Lundy left appellant's home she had never seen the respondent and did not even know his name.

Assuming that the appellant's wife had any affection for him which could have been alienated by any one, which may well be doubted in view of the testimony, there is absolutely no evidence which would have supported a finding that the respondent did anything which tended to or which did alienate any affection which may have existed. So far as here appears, the respondent knew nothing about Mrs. Lundy or the appellant, and there is nothing to show that the check he gave his employee was not due to her for wages.

There being no evidence of sufficient substantiality to support a verdict in favor of the appellant, the motion for a directed verdict was properly granted. In re Estate of Flood, 217 Cal. 763, 21 P.(2d) 579; In re Estate of Lances, 216 Cal. 397, 14 P.(2d) 768; Newson v. Hawley, 205 Cal. 188, 270 P. 364.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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10 Cal.App.2d 122

RAY v. SCHUBACH et al.

Civ. 9774.

District Court of Appeal, Second District, Division 1, California.

Nov. 12, 1935.

Bankruptcy ⚷425

Payee of note could not recover thereon from maker who had been adjudicated bankrupt notwithstanding that note was not listed in schedules in bankruptcy proceedings, where payee had actual notice of proceedings, which were commenced after maturity of note (Bankr. Act § 17a, subd. 3 [11 USCA § 35, subd. 3]).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Frederick Ray against Al. Schubach and W. J. Patterson. From the judgment, W. J. Patterson appeals.

Reversed, with directions.

George Acret, of Los Angeles, for appellant.

F. E. Allen, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Action upon a promissory note. The maker pleaded as defenses the statute of limitations and also his former adjudication as a bankrupt. Plaintiff had judgment upon findings reciting, among other things, that appellant was adjudicated a bankrupt in May, 1927, "and that within one year thereafter he duly and regularly received an order of discharge in said bankruptcy; that said promissory note was not listed in the schedules in said bankruptcy proceedings; * * * that said M. R. Ward, the plaintiff's assignor and the then owner and holder of said promissory note, at Aberdeen, Washington, in the law offices of John C. Hogan, said Patterson's attorney, discussed with said defendant said defendant Patterson's then pending bankruptcy proceedings and said Ward stated at the time to said Patterson that he was sorry that said defendant had been obliged to file in bankruptcy."

Appellant asserts that this finding shows respondent's claim to be barred by reason of appellant's bankruptcy, and the knowledge which the payee of the note had thereof. The Bankruptcy Act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as "(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Section 17a, Bankr. Act (11 USCA § 35, subd. 3). The court having found that the payee, who was then the owner and holder of the note, had actual notice of the bankruptcy proceedings, commenced a number of years after its maturity, there can be no recovery thereon.

Respondent does not challenge the findings as not being supported by the evidence.

The judgment is therefore reversed, with directions to the trial court to enter judgment for the appellant.

We concur: HOUSER, P. J.; YORK, J.

9 Cal.App.2d 525

HURD v. WALKER.

Civ. 5436.

District Court of Appeal, Third District, California.

Oct. 17, 1935.

1. **Appeal and error** ⚷110

Appeal does not lie from order denying motion for new trial (Code Civ. Proc. § 963).

2. **Appeal and error** ⚷1011(1)

Appellate court cannot disturb findings or judgment on conflicting evidence on fact question.

3. **Bastards** ⚷63

In affiliation proceedings, child's likeness to alleged father constitutes some slight evidence of paternity.

4. **Appeal and error** ⚷938(5)

On appeal on settled bill of exceptions showing no objection to introduction of court record, appellate court must assume absence of objection.

5. **Appeal and error** ⚷204(1)

Objection to introduction of evidence may not be first made on appeal.

6. **Appeal and error** ⚷926(5)

Appellate court will presume in support of judgment that proper foundation for introduction of otherwise proper court record or document was established, in absence of contrary showing in bill of exceptions.

◆

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Action by Raymond Hurd against Christina Walker. From an adverse judgment, plaintiff appeals.

Affirmed.

Peter T. Rice and Stanley Visel, both of Los Angeles, for appellant.

Ernest M. Best, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him in a suit under the provisions of section 231 of the Civil Code to determine the paternity of an illegitimate child. It was held that he is the father of the child.

The appellant contends that the findings and judgment are not supported by the evidence; that the court erred in receiving in evidence a previous record of the proceedings of the juvenile court declaring him to be a ward of the court without first requiring the foundation for its admission to be proved. It is also asserted the court erred in denying plaintiff's motion for a new trial. The appeal is presented to this court on a settled bill of exceptions.

[1] An appeal from an order denying a motion for new trial does not lie. Section 963, Code Civ. Proc.; Nordin v. Eagle Rock State Bank, 139 Cal. App. 584, 589, 34 P.(2d) 490; Heine Piano Co. v. Bloomer, 183 Cal. 398, 191 P. 900. Section 963, supra, was amended in 1915 (St. 1915, p. 209), so as to exclude the right of appeal from an order denying a motion for new trial. The notice of appeal from the order denying the motion for new trial in this case is ineffectual.

[2, 3] The findings and judgment declaring that the plaintiff is the father of Kenneth Johnson, the illegitimate child of the defendant, are sufficiently supported by the evidence. There is a conflict of evidence in that regard. Under the well-established rule governing appellate courts under such circumstances, we are powerless to disturb the findings or judgment. Blythe v. Ayres, 102 Cal. 254, 36 P. 522; In re Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131; 2 Cal. Jur. p. 879, § 515. The defendant testified positively to repeated acts of sexual intercourse with the plaintiff at times when the child in question was likely to have been conceived. She said that she had access to no other man during that period of time. Kenneth was a witness at the trial of this case. He was then nine years of age. The trial judge had an opportunity of observing him and his likeness to the plaintiff which furnishes some slight evidence of paternity. The trial judge also had the opportunity of seeing the witnesses on the stand and of judging of their credibility and of the weight and sufficiency of the evidence. Other circumstances support the findings of the court that plaintiff is the father of the child. The evidence is therefore sufficient to support the findings and judgment.

[4-6] The appellant assigns the admission in evidence of the juvenile court proceedings as reversible error. We think not. That record was admitted "for lim-

ited purposes only." We assume that it was admitted for the purpose of impeaching the plaintiff by showing that he had made statements in that court proceeding in conflict with his testimony in this case. Moreover, we must assume this record was admitted in evidence without the objection of the appellant. The settled bill of exception does not show that any objection was made to the introduction of this record. An objection to the introduction of evidence may not be made for the first time on appeal. 2 Cal. Jur. p. 263, § 82. In the absence of a showing in the bill of exceptions to the contrary, in support of a judgment it will be presumed proper foundation for the introduction of an otherwise proper court record or document was established. Nemo v. Farrington, 7 Cal. App. 443, 446, 94 P. 874, 877.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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10 Cal.App.2d 61

WINSBY v. KERTELL et al.

Civ. 9600.

District Court of Appeal, First District, Division 1, California.

Nov. 7, 1935.

Rehearing Denied Dec. 7, 1935.
Hearing Denied by Supreme Court Jan. 6, 1936.

1. **Negligence** 🔑44

Proprietor of flower shop *held* obligated to exercise ordinary care for invitees' safety.

2. **Appeal and error** 🔑1008(1)

Negligence in allowing presence of wet leaves on floor of flower shop in path of customers *held* for court in trial without jury.

3. **Negligence** 🔑136(22)

In action by customer who fell while leaving flower shop, whether proprietor knew of presence of wet leaves on floor in time to remedy condition *held* fact question for court in trial without jury.

◆

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Alice B. Winsby against Eunice Fay Kertell and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

L. R. Weinmann, Samuel H. Berry, and Weinmann, Quayle & Berry, all of Oakland (George P. Tobin, of Oakland, of counsel), for appellant.

D. W. Brobst, of Oakland, for respondent.

TYLER, Presiding Justice.

Action for damages for personal injuries. Plaintiff, a woman some seventy-two years of age, visited the flower shop of defendants located at the end of Piedmont avenue, adjacent to the entrance of Mountain View Cemetery, in the city of Oakland, for the purpose of purchasing some flowers. While in the act of leaving the store, she fell, fracturing her right arm and sustaining bruises about her body. She brought an action against defendants and prayed for general and special damages in the sum of $20,386.95 for her injuries. The cause was tried before the court without a jury and judgment was entered in favor of plaintiff for the sum of $3,386.95.

The court in substance found in relation to the negligence of defendants that on the 23d day of November, plaintiff entered said store for the purpose of purchasing certain cut flowers; that at said time and place the defendant Kertell operated said store under the firm name and style of Morse's Flower Shop; that said operator Kertell had carelessly and negligently permitted certain leaves which were damp with water to lie on the floor in the area necessary to be traversed by plaintiff in leaving; that defendant Kertell had knowledge of the fact that the damp leaves were present on the floor prior to the happening of the accident, and that plaintiff had no knowledge thereof; that while plaintiff was in the act of walking across the floor for the purpose of leaving the store one of her feet came in contact with the damp leaves which had caused the floor to become slippery and dangerous, and as a direct result thereof she fell violently, which fall was proximately caused by the negligence and carelessness of the defendant Kertell who was transacting business under the firm name of Morse's Flower

Shop in permitting said floor to be slippery and dangerous by the presence of wet leaves.

[1-3] It is the claim of appellant that the findings are unsupported. There is no merit in the contention. Defendant was under an obligation to exercise ordinary care for the safety of invitees upon her premises. Rothschild v. Fourth and Market St. R. Co., 139 Cal. App. 625, 34 P.(2d) 734. Plaintiff testified positively that she slipped and fell to the floor because of the presence of wet leaves. It then became a question for the court to determine whether or not the defendant was negligent in permitting the leaves to be lying on the floor where customers were wont and were required to walk while making purchases. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646. There was testimony that defendant Kertell had knowledge of the presence of the leaves and that she had told one of her employees to clean up the same and he had failed to do so. Whether or not defendant had knowledge of the condition for a sufficient time to remedy it was a question of fact for the trial judge. Rothschild v. Fourth and Market St. R. Co., supra. Appellant relies upon the principle declared in Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, to the effect that where a plaintiff has full knowledge of the condition of the floor at the time of the accident, it is negligence on her part to continue in the use thereof. Here there was evidence to show that the plaintiff prior to her injury had no such knowledge.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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9 Cal.App.2d 641

CITY OF SIGNAL HILL v. WYSE.

Civ. 10325.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

1. Appeal and error 🔑931(1)

Uncertainties or ambiguities in findings must, if possible, be construed to support judgment.

2. Appeal and error 🔑907(3)

On appeal on judgment roll alone, findings should be given broadest possible meaning whenever necessary to support judgment.

3. Eminent domain 🔑223

Where defendant in condemnation action admitted ownership of land and alleged that value was $10,000, finding that compensation proper to be paid for defendant's interest was $3,000, with interest, less certain amounts representing street bonds, *held* sufficient to uphold judgment as against contention that finding did not fix value of property (Const. art. 1, § 14).

4. Eminent domain 🔑223

Finding as to facts constituting basis of determining value of property *held* unnecessary to uphold judgment in condemnation action.

5. Appeal and error 🔑259

Contention in condemnation action that court found value of property on insufficient evidence because there was no testimony concerning substructure of land could not be considered on appeal on judgment roll alone.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Condemnation action by the City of Signal Hill against Harry J. Wyse. From the judgment, defendant appeals.

Affirmed.

Minor Blythe, of Los Angeles, for appellant.

E. P. Mulholland, of Long Beach, for respondent.

EDMONDS, Justice pro tem.

This appeal by the defendant in a condemnation action has been taken upon the judgment roll alone. The principal question presented concerns the sufficiency of the findings of the trial court.

The complaint, in which appellant is the sole defendant named alleged the facts on which the city based its right to take the one parcel of land owned by him upon payment of its value. Appellant in his answer admitted his ownership of the land and alleged it to be of the reasonable value of $10,000. The trial court made a finding "that the total compensation proper to be paid to the defendant, Harry J. Wyse, herein for the taking of his interest in said parcel of land is the sum of Three Thousand Dollars ($3,000.00) with interest," less certain amounts to be deducted for street bonds outstanding against the property. It is contended that this finding does not fix the value of the property.

[1-3] It is a rule of law that any uncertainties or ambiguities in findings must be construed, if possible, so as to support the judgment. Hambright & Walsh Co. v. Provident Pledge Corp., 25 Cal. App. 600, 602, 144 P. 971. Also, "upon an appeal from the judgment [upon the judgment] roll alone, the language of the findings is to be given the broadest possible meaning, whenever it is necessary to do so in order to support the judgment." Bell v. Adams, 150 Cal. 772, 775, 90 P. 118, 119. Applying these principles, the finding criticized is sufficient to uphold the judgment. The only issue raised by the pleadings was the value of the property sought to be taken. The court found appellant to be the sole owner in fee of the property and that he suffered no damage by reason of severance. It also found the amount of "compensation proper to be paid" therefor. To hold that this finding is not equivalent to one using the words "value" or "market value" would, in view of the other findings in the case, not only be placing a forced construction upon the language, but would also determine that the provisions of the Constitution were ignored by the trial court. The Constitution provides that: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Article 1, § 14. The "compensation" fixed by the findings must be deemed to be that required by the Constitution to be paid to the owner.

[4] Appellant also complains because the trial court did not make a finding as to the facts constituting the basis of determining the value of the property. "It has been frequently observed that findings should be of ultimate facts, and that it is unnecessary to state the probative or evidentiary facts, for a finding of ultimate facts includes a finding of all of the probative facts necessary to sustain it." 24 Cal. Jur. 968.

[5] The point is also made that the court found the value of the property upon insufficient evidence, because there was no testimony introduced concerning the substructure of the land. If there were any merit in this point, it cannot be considered on an appeal on the judgment roll alone.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 58

ABLETT v. HANCOCK OIL CO. et al.

Civ. 1901.

District Court of Appeal, Fourth District, California.

Nov. 6, 1935.

Costs 🔑8

Trial court in dismissing injunction suit for failure of plaintiff to first exhaust legal remedy had authority to award judgment for costs, notwithstanding recital in order that court was "without jurisdiction."

Appeal from Superior Court, San Diego County; J. T. B. Warne, Judge.

Suit by Oliver Ablett against the Hancock Oil Company and another. From orders and judgments of dismissal, plaintiff appeals.

Affirmed.

Robert B. Burch, of San Diego, for appellant.

George H. Emerson, of Los Angeles, and Hunter M. Muir, of San Diego (Oral R. Finch, of Los Angeles, of counsel), for respondents.

BARNARD, Presiding Justice.

In this action the plaintiff sought to enjoin and restrain the defendants from levying execution upon a judgment which the defendant oil company had secured against this plaintiff in a prior action in a justice's court. An answer was filed and the matter came on regularly for trial. The plaintiff introduced evidence, oral and documentary, and rested his case. The defendants then moved for a dismissal upon the grounds that the plaintiff had failed to prove that the defendant was a corporation, that the court was without jurisdiction for the reason that the plaintiff had not first exhausted his legal remedies in the court below, and that the plaintiff had failed to prove the allegations of his complaint. The matter was argued and submitted and the court entered an order in which, after reciting the above, it was ordered that the complaint be dismissed and that the defendant oil company recover its costs in the sum of $77. A nunc pro tunc order was later entered which, after the same general recitals, ordered the complaint dismissed "without prejudice, for the reason that the court is without jurisdiction in the case for the reason that the plaintiff had not first exhausted his legal remedies in the court below," and with the same award of costs.

The plaintiff has appealed on the judgment roll alone from both orders and judgments. The only point raised by the appellant is that the court was without authority to award a judgment for the costs since the action was dismissed for want of jurisdiction. The appellant relies upon the quoted portion of the nunc pro tunc order, and upon such cases as Begbie v. Begbie, 128 Cal. 154, 60 P. 667, 49 L. R. A. 141, and Gutting v. Globe Indemnity Co., 119 Cal. App. 288, 6 P.(2d) 298, where it has been held that there can be no judgment for costs except as a part of the judgment upon the issues in the action, and that where it appears that a court is without jurisdiction, it has no authority to proceed or to consider any other question in the case.

In determining whether the court had power to award costs in this case, the real question is whether the order and judgment entered should be interpreted as dismissing the action for a lack of jurisdiction to act therein or for a failure of proof. As was said in Burlingame v. Manchester, 44 App. D. C. 335, 337: "There is a well-defined distinction between the lack of jurisdiction to grant equitable relief in a given case, and the want of jurisdiction which totally deprives a court of power to proceed." It fully appears that it is in the first of these senses that the words "without jurisdiction" are used in the nunc pro tunc order, as the same assigns the failure to exhaust other remedies as the reason for the absence of jurisdiction. That the appellant had not first exhausted his other remedies must have been disclosed by the evidence, for that fact does not appear from the pleadings, and the dismissal is thus based upon the appellant's failure to prove a certain fact.

The complaint alleged ground for equitable relief and the court had jurisdiction both of the parties and the subject-matter of the action. After a full hearing, in which the appellant presented all of his evidence, the court was faced with the question as to whether other remedies has been exhausted. In deciding that question, the court was exercising jurisdiction and not refusing to act for lack of jurisdiction. The court was not without power to proceed in the matter and, in practical effect, the order made amounted to the granting of a motion for a nonsuit. The judgment was given upon issues which had arisen in the action and the allowance of costs was proper.

In view of our holding upon the main point presented certain other questions raised by the respondents, relating to the sufficiency of the record before us and the validity of the nunc pro tunc order, require no consideration.

The orders and judgments appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

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9 Cal.App.2d 636

ROWLEY v. BRYSON.

Civ. 9417.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1935.

1. Executors and administrators 🔑443(5)

In action by administratrix of alleged beneficiary of life policy against administrator of insured to recover proceeds of policy, complaint *held* demurrable for failure to allege that proceeds of policy had been received by administrator.

2. Pleading 🔑225(2)

In action by administratrix of alleged beneficiary of life policy to recover proceeds of policy from insured's administrator, demurrer to complaint which failed to allege that proceeds were received by administrator *held* properly sustained without leave to amend, where plaintiff had ample opportunity to allege receipt of money by defendant but failed to do so, and likewise failed to seek leave to amend complaint to cure defect.

◆

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by Lucille E. Rowley, administratrix of the estate of Burt M. Rowley, deceased, against Frank Bryson, administrator of the estate of Edgar T. Albert, deceased. From a judgment for defendant after sustaining demurrer to complaint without leave to amend, plaintiff appeals.

Affirmed.

John W. Satterwhite, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this action on a creditor's claim against the estate of a decedent, the court sustained a demurrer to the first amended complaint without leave to amend. From the resulting judgment plaintiff appeals.

The claim, which was rejected in its entirety, was for the sum of $3,500, being the amount of insurance under a life insurance policy in which plaintiff's intestate, Burt M. Rowley, was beneficiary, and defendant's intestate, Edgar T. Albert, was the insured. Plaintiff's right to the money was alleged to be founded upon a contract under which Rowley agreed to, and did, take charge of, nurse, and care for Ada Albert, sister of Edgar Albert, in consideration of the latter's agreement, under which Rowley was to, and did, become beneficiary, and he or his heirs were to receive the proceeds of the policy, which agreement it was alleged was fully performed by Rowley, who predeceased Albert. The defect in the complaint, because of which the demurrer was sustained, is the failure to allege that the proceeds of the policy had ever been received by defendant administrator. This defect is fatal to the complaint. No indebtedness was created under the agreement as between the parties. The defendant estate did not owe the plaintiff estate anything in the absence of collection of the proceeds of the policy by the former.

[1, 2] The complaint did not allege facts showing any indebtedness owing by defendant estate, and the demurrer was therefore properly sustained. Plaintiff had ample opportunity to allege the receipt of the money by defendant, but failed to do so, and likewise failed to seek leave to amend the complaint to cure the defect. The demurrer was therefore properly sustained without leave to amend.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

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9 Cal.App.2d 364

WISE v. CITY OF LOS ANGELES.

Civ. 10454.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1935.

Hearing Denied by Supreme Court Dec. 5, 1935.

Municipal corporations 🔑790

In action for injuries resulting from dangerous condition of street, knowledge of such condition by surveyor who dug hole which created dangerous condition *held* to bring case within statute providing for liability of municipalities for injuries resulting from dangerous condition of public streets, where person having authority to remedy condition had knowledge of it (Gen. Laws 1931, Act 5619, § 2).

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Appeal from Superior Court, Los Angeles County; H. D. Burroughs, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 49 P.(2d) 1122.

Hearing denied by Supreme Court; SHENK and LANGDON, JJ., dissent.

Ray L. Chesebro, City Atty., and Frederick Von Schrader and Thatcher J. Kemp, Deputy City Attys., all of Los Angeles, for appellant.

C. E. Hollopeter, of Alhambra, and Kent C. Rogers, of Los Angeles, for respondent.

PER CURIAM.

Defendant's petition for a rehearing places great reliance upon the decision in Watson v. City of Alameda, 219 Cal.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

331, 26 P.(2d) 286, and it is claimed the rule therein announced is contrary to the law as stated in the last paragraph of our opinion.

It is to be noted that the judgment in the instant case would be affirmed for the other reasons stated in the decision, even though the last paragraph were entirely eliminated from the opinion. The law as we have stated it is not contrary to the decision in Watson v. City of Alameda, supra; the cases being clearly distinguishable on several grounds.

First. In Watson v. City of Alameda, supra, an employee of defendant painted a line in the street. This act was not *inherently* wrong or *dangerous,* while the digging of a hole in a public highway, as in the instant case, is obviously *inherently dangerous.* Mr. Justice Langdon recognizes this distinction in the case of Watson v. City of Alameda, 219 Cal. 331, at page 333, 26 P.(2d) 286, 287, wherein he says: "Reference is made by plaintiff to the special doctrine that notice is unnecessary where the planned improvement is *inherently wrong and dangerous.*" Citing among other cases, Kaufman v. Tomich, 208 Cal. 19, 280 P. 130.

In Kaufman v. Tomich, 208 Cal. 19, at page 26, 280 P. 130, 133, a case wherein the municipality directed an independent contractor to dig a ditch which the court found was *inherently dangerous,* Mr. Chief Justice Waste in holding defendant municipality liable points out: "The court having found that the location of the ditch endangered plaintiff's property, it was the duty of the city at all events to prevent the injury."

Second. There is a clear distinction between the instant case and Watson v. City of Alameda, in that Act 5619 (Stats. 1923, p. 675; vol. 2, Deering's Gen. Laws, 1931, p. 3052) reads in part as follows: "Municipalities * * * shall be liable for injuries to persons * * * resulting from the dangerous or defective condition of public streets, highways, * * * in all cases where the governing or managing board of such * * * municipality, * * * or other board, *officer or person having authority to remedy such condition,* had knowledge or notice of the defective or dangerous condition of any such street, highway." (Italics ours.) Section 2.

All the statute requires is that the *person having authority to remedy such condition* shall have *knowledge* or *notice* of the defective or *dangerous condition.*

In Watson v. City of Alameda, 219 Cal. 331, at page 332, 26 P.(2d) 286, 287, the work was done by an employee of the defendant city, and Mr. Justice Langdon says: "Since the accident happened shortly after the work was done, there was, of course, no opportunity for the chief of police, superintendent of streets, *or any other responsible officer of defendant* to obtain knowledge or notice of any dangerous condition; and, indeed, the condition itself could last but a few hours, during which the paint would dry." (Italics ours.)

In the instant case the testimony showed that the surveyor who dug the hole was an *officer or person having authority to remedy such condition.* Thus there was notice and knowledge of the dangerous condition to the person having authority to remedy such condition, as required by Act 5619, supra.

Petition for rehearing is denied.